Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOAN DAWSON, PAUL DAWSON and TANDRA DAWSON,
Petitioners,

v.

DONALD M. HALPERIN, Commissioner of the New York State Division of Housing and Community Renewal, and THE CITY OF NEW YORK,
Respondents.

Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1983 Joan Dawson purchased a small Harlem brownstone as a home for herself and her family, and moved in shortly thereafter. She intended to eventually evict its two rent controlled tenants under the owner-occupancy eviction provisions of New York law. However, seven months later a new state law was enacted barring such evictions. As a result, the tenants remained in occupancy for over a decade. The following questions are presented:

1) Whether Joan Dawson and her family suffered a taking of their property by physical occupation, under the Fifth and Fourteenth Amendments to the United States Constitution, as a result of the compelled tenancies imposed on them by New York State's ban on owner-occupancy evictions;

2) Whether the Dawsons suffered a regulatory taking as a result of this ban;

3) Whether New York State's attempt to force the Dawsons to remain landlords violated their right to due process.

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PETITION FOR A WRIT OF CERTIORARI

Jane Dawson, Paul Dawson and Tandra Dawson petition this Court for a writ of certiorari to review the ruling of the New York State Court of Appeals, which dismissed their appeal and effectively affirmed a lower court ruling denying their constitutional takings and due process claims.

DECISIONS BELOW

The first decision in this case was issued by the New York State Supreme Court, New York County, in 1992, and is reported as *Dawson v. Higgins*, 154 Misc. 2d 811, 588 N.Y.S.2d 93 (1992). Appendix (App.) 16a. The Dawsons sought to directly appeal this decision to the New York State Court of Appeals on the ground that it involved solely constitutional issues. The Court of Appeals rejected their motion and transferred the case to Appellate Division of the State Supreme Court. 80 N.Y.2d 969, 591 N.Y.S.2d 135, 605 N.E.2d 871 (1992),

App. 26a. The Appellate Division affirmed the trial court's ruling in April, 1994. —— A.D.2d ——, 610 N.Y.S.2d 200 (1994), App. 2a. The Dawsons' subsequent appeal was summarily dismissed as moot by the Court of Appeals in a *sua sponte* order issued on July 7, 1994. —— N.Y.2d ——, —— N.Y.S.2d ——, App. 1a.[1]

JURISDICTION

The ruling of the New York State Court of Appeals was issued on July 7, 1994. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution reads in relevant part:

> "No person . . . shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation."

The Fourteenth Amendment, Section 1, reads in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Rent-controlled housing in New York City is governed by both state and city law. The state regulation dealing with owner-occupancy eviction, 9 N.Y.C.R.R. § 2204.5 (a), is set forth at App. 27a. The relevant section of the New York City Administrative Code, § 26-408(b)(1), appears at App. 30a.

STATEMENT OF THE CASE

At issue in this case is the right of a New York City brownstone owner to make her house her home. When Joan Dawson bought her Harlem brownstone, New York

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[1] The current commissioner of the respondent State Division of Housing and Community Renewal is Donald M. Halperin. Pursuant to Supreme Court Rule 35.3, the instant case has been accordingly captioned.

law permitted her to evict her rent-controlled tenants so that she and her family could fully occupy their house. Seven months later, however, the law was amended to prohibit such owner-occupacy evictions.

Joan Dawson and her children challenged this law on the ground that it violated their fundamental right to occupy their own property and to cease being landlords. Two lower New York courts ruled against them, and they appealed to the state's highest court. In the meantime, weary of enduring ten years of involuntary landlordship, Ms. Dawson paid her two tenants to vacate their units. Her counsel informed the Court of Appeals of this fact, pointing out that it did not affect the merits of the appeal; the continuing taking claimed by Ms. Dawson had simply become a temporary taking for which compensation was still required under *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987).

Less than two months later, without any further briefing on this issue, the Court of Appeals, *sua sponte*, summarily dismissed the appeal as moot. Because the lower court decision was not vacated by this dismissal, its denial of the Dawsons' constitutional claims bars any future temporary taking claims that they might bring.

As is shown below, the Court of Appeals' ruling of mootness directly conflicts with this Court's holding on temporary takings in *First English*. More importantly, the Appellate Division decision, which for all practical purposes was affirmed by the Court of Appeals, conflicts with this Court's rulings on the constitutionality of compelled tenancies in *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992), and in *Bowles v. Willingham*, 321 U.S. 503, 517 (1944).

For Joan Dawson and her family, these rulings excuse a decade-long violation of a landlord's "traditional right to evict a tenant in order to occupy a rental unit personally". *Fresh Pond Shopping Center, Inc. v. Callahan*, 464

U.S. 875, 876 (1983) (Rehnquist, J., dissenting from dismissal of appeal), *cited with approval* in *Yee*, 112 S.Ct. at 1529. For others in her position in New York City, these rulings destroy the fundamental right to make one's house one's home. And for landlords living under rent control regimes elsewhere, these rulings undermine a basic property right.

Statement of Facts

In November, 1983, schoolteacher Joan Dawson purchased a small Harlem brownstone as a home for herself and her two grown children, Paul and Tandra Dawson. 610 N.Y.S.2d at 203, App. 3a. The Dawsons moved into the house and have lived there ever since, together with Tandra's daughter (Joan Dawson's granddaughter) and two foster children for whom Joan Dawson cared.[2] *Id.* The house is the Dawsons' only real property. *Id.*

When Joan Dawson purchased her house it contained two occupied rent-controlled units. *Id.* Under New York law at the time of her purchase, these tenants could have been evicted by Ms. Dawson so that she and her family could have those units for themselves. The law at that time provided for eviction certificates to be issued when the

> "landlord seeks in good faith to recover possession . . . because of immediate and compelling necessity for his own personal use and occupancy or for [that] of his immediate family; provided, however, that where the housing accommodation is located in a building containing twelve or less housing accommodations and the landlord does not reside in the building and the landlord seeks in good faith to recover possession for his own personal use and occupancy, an immediate and compelling necessity need not be established." N.Y.C. Admin. Code § Y51-6.0(b)(1),

[2] The foster children no longer live with the Dawsons, having moved in with an aunt in August, 1994.

McKinney's Unconsol. Laws (prior to 1986 recodification); *see* 610 N.Y.S.2d at 203, App. 3a.

Seven months after Ms. Dawson bought her brownstone, however, her ability to evict her tenants was destroyed. On June 19, 1984, the owner-occupancy eviction provisions of the state rent control laws were amended by Chapter 234.. 610 N.Y.S.2d at 205, App. 4a-5a. Under this amendment, tenants who were 62 years of age or older, who were disabled, or who had resided in the building for more than 20 years could no longer be evicted for reasons of owner occupancy. 1984 N.Y. Laws, ch. 234 § 1. This change took effect immediately and applied to "any tenant in possession at or after the time it takes effect . . . ." *Id.* at § 4; *see* 610 N.Y.S.2d at 204, App. 5a. Because Ms. Dawson's two tenants qualified as long-term tenants under this law, she could no longer evict them on owner-occupancy grounds. *Id.*

In August, 1990, Joan Dawson and her two children filed a verified complaint in New York State Supreme Court challenging this bar to evicting their tenants. They alleged that the law was invalid under the Constitutions of the United States and of New York State on several counts: as an uncompensated taking of their property by physical occupation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and of Article I, sections 6 and 7 of the New York State Constitution; as an uncompensated regulatory taking, also in violation of these provisions; as an involuntary servitude, contrary to the Thirteenth Amendment of the U.S. Constitution; and as a violation of the due process guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, sections 6 and 7 of the New York Constitution.

In June, 1992, ruling on cross-motions for summary judgment, a New York Supreme Court trial court denied all of the Dawsons' claims. 154 Misc. 2d 811, 588 N.Y.S.2d 93, App. 16a. The trial court interpreted *Yee*

as somehow *upholding* compelled tenancies such as those imposed on the Dawsons. 588 N.Y.S.2d at 96, 97, App. 21a, 24a.

Because the only issue raised in their case was the constitutionality of a state law, the Dawsons were entitled to appeal directly to the State Court of Appeals. *See* N.Y. CPLR § 5601(b)(2).[3] But the Court of Appeals turned down their appeal and transferred the case to the Appellate Division, stating "that a direct appeal does not lie when questions other than the constitutional validity of a statutory provisions are involved . . . .". 591 N.Y.S.2d 135, App. 26a. The court gave no hint as to what those other questions might be.

On April 5, 1994, the Appellate Division issued its decision denying the Dawsons' claims. Unlike the trial court, the Appellate Division acknowledged that compelled tenancies were proscribed, rather than validated, by *Yee*, and that this proscription applied to existing tenancies as well as to new ones:

> "The *Yee* court did note, . . . and it is on this caveat that plaintiffs premise their argument, that '[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.' " 610 N.Y.S.2d at 206, App. 9a, *quoting Yee*, 112 S.Ct. at 1522.

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[3] N.Y. C.P.L.R. § 5601(b) states:

"Constitutional grounds. An appeal may be taken to the court of appeals as of right:

"1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

"2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision . . . under the constitution of the state or of the United States."

However, the court declared that the tenancies imposed upon the Dawsons were not perpetual, because there supposedly were a number of hypothetical scenarios that might terminate them:

> "Notwithstanding the fact that 20-year tenants cannot be evicted for the personal use of the landlord or his or her family, the occurrence of a number of events would allow the landlord to recover such a tenant's housing accommodation. For instance, the landlord might recover the unit upon the tenant's death or upon the tenant's violation of a substantial obligation of the tenancy, or in instances where the tenant is committing acts constituting a nuisance . . . or permitting the accommodation to be used for immoral or illegal purposes; or upon the landlord's decision to demolish or substantially alter the premises or to withdraw the premises from the rental market where there is no reasonable possibility o[f] realizing a net annual return of 8½% of the property's assessed value. (*See,* Administrative Code § 26-408; 9 NYCRR § 2204). Plaintiffs have failed to make a showing that these contingencies cannot occur and thus are unable to show that the amended owner-occupancy provisions have created perpetual tenancies." 610 N.Y.S.2d at 206, App. 9a-10a.

The court rejected the Dawsons' regulatory taking claim as well, ruling that when Joan Dawson bought her house, her expectation of evicting her tenants was highly uncertain. Given the vast scope of New York City rent control and its "continuing trend" toward greater tenant protection, Ms. Dawson supposedly could not expect the owner-occupancy eviction law to remain stable. 610 N.Y.S.2d at 207-08, App. 13a. The court also ruled that her expectation was "uncertain" because, even in the absence of Ch. 234, Ms. Dawson would have had to make a showing of immediate and compelling need before she could evict her tenants. *Id.* at 208, App. 13a. The Dawsons' other claims were similarly dismissed.

The Dawsons appealed to the Court of Appeals in May, 1994. Shortly afterwards, that court requested additional comments from all parties regarding the constitutional issues raised in the case. App. 35a. The Dawsons' response to the court noted the tenant buy-out, but pointed out that the tenants' departure did not affect the merits of the appeal. App. 37a. The fact that the alleged taking was no longer a continuing one, but instead had become finite in duration, in no way changed the constitutional requirement of compensation. App. 38a n.3, *citing First English*, 482 U.S. at 321.

None of the opposing parties challenged this contention. On July 7, however, the Court of Appeals issued a one-sentence order stating "that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that the issues presented have become moot." App. 1a. The decision below was not vacated. It is this order, and the underlying decision which it effectively affirms, that this Court is requested to review.

REASONS FOR GRANTING THE WRIT

I. THE ISSUE OF A LANDLORD'S RIGHT TO PERSONALLY OCCUPY HER HOUSE IS AN IMPORTANT FEDERAL QUESTION WHOSE DISPOSITION BELOW IS DIRECTLY CONTRARY TO SUPREME COURT RULINGS

In summarily dismissing this case as moot, the Court of Appeals committed a clear constitutional error. At the same time, the cursory nature of its order threatens to obscure the heart of this case—Joan Dawson's basic right to occupy the property that she owns. The Appellate Division decision destroyed that right. Because that decision was for all practical purposes affirmed by the Court of Appeals, its validity and implications are the major focus of this petition.

The Court of Appeals' constitutional error is clear from *First English*—Joan Dawson's buy-out of her tenants

may have ended the compelled tenancies that had been imposed on her, but it in no way absolved New York of its constitutional liability for the past. "[W]here the government's activities have already worked a taking . . ., no subsequent action . . . can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321. If Joan Dawson suffered a continuing taking while her tenants lived in her building, then their buy-out simply made her the victim of a completed taking. Her takings claim was as live after the buy-out as it was before, and, in fact, its legal merits did not change in the least—" 'temporary takings' . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 318.

The Court of Appeals' dismissal of this case left the Appellate Division decision intact; an "order dismissing an appeal is the functional equivalent of an affirmance for jurisdictional purposes . . . ." *Reynolds Securities, Inc. v. Underwriters Bank & Trust Co.*, 44 N.Y.2d 568, 571 n.1, 406 N.Y.S.2d 743, 745 n.1 (1978).[4] The Appellate Division ruling that Joan Dawson suffered no takings or due process violation is, of course, binding on her. In this respect, Joan Dawson's predicament is no different than that of the property owner in *Lucas v. South Carolina Coastal Council*—in both cases, the state court decisions "preclude, both practically and legally, any takings claim with respect to . . . *past* deprivation." 112 S.Ct. 2886, 2891 (1992). As for David Lucas, for Joan

[4] Had the Court of Appeals intended otherwise, it would have "erase[d] the whole case from the books, either by dismissing the complaint or petition or by directing the courts below to do so. In this way, the possibility of any claims of res adjudicata based upon the decision below would be obviated. The Court of Appeals has followed that practice . . . ." H. Cohen & A. Karger, *Powers of the New York Court of Appeals* 420 (1952).

The Supreme Court follows this same "established practice". *United States v. Munsingwear Inc.*, 340 U.S. 36, 39 (1950).

Dawson the only recourse is this Court's "intervention now". *Id.*

The Appellate Division viewed Joan Dawson's inability to evict her tenants as a "minimal restriction" that was a natural part of rent control's "continuing trend . . . toward tenant protection." 610 N.Y.S.2d at 209, 207-08, App. 15a, 13a. New York's owner-occupancy eviction ban, however, was not simply another garden-variety rent control regulation. In destroying Ms. Dawson's ability to evict her tenants so that she and her family could fully occupy the house she owned, New York struck at one of the most basic attributes of private property rights—the right to exclude. It did so, moreover, in precisely the manner that this Court has described as constituting a taking in two separate rulings.

A. This Court's Decision In *Yee v. City of Escondido* Makes It Clear That The Compelled Tenancies Imposed On Joan Dawson Constituted A Taking By Physical Occupation

This Court has repeatedly noted that the "right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994), *quoting Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). It has vigorously reaffirmed this right in contexts ranging from forced public access to private marinas (*Kaiser Aetna, supra*) to cable television boxes on apartment house roofs (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)) to easements imposed upon beachfront yards (*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)) to municipal floodplain exactions. *Dolan, supra.*

Most importantly, in *Yee* this Court considered the application of this right to compelled tenancies. *Yee* involved a facial physical takings challenge by mobilehome park owners to a local mobilehome rent control ordinance. This Court held that, viewed in the context of the Cali-

fornia state law, there was no physical taking because there had been no compelled tenancy:

> "At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so." 112 S.Ct. at 1528.

But the Court did make it clear that, if the law *had* compelled the landowners to rent, then it would have been unconstitutional:

> "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent or to refrain in perpetuity from terminating a tenancy." *Id.* at 1529, *citing FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 n.6 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987); *Fresh Pond*, 464 U.S. at 877 (Rehnquist, J., dissenting).

Dawson involves precisely this sort of compulsion. Under New York law, Joan Dawson was compelled to continue renting her two units—until, that is, she finally paid her tenants to vacate. As is shown below, the court's attempt to characterize this compulsion as something other than perpetual is an exercise in speculative semantics, aimed solely at avoiding *Yee*.

Prior to *Dawson*, the Appellate Division had had no difficulty in recognizing the endless nature of rent control tenancies. In an earlier decision involving similarly unevictable tenants, the court candidly described the tenants as "hav[ing] *a perpetual right to remain in possession* subject to rent control by reason of their age or longevity in occupancy." *Sobel v. Higgins*, 188 A.D.2d 286, 590 N.Y.S.2d 883, 884 (1st Dept. 1992) (emphasis added), *app. dismissed*, 81 N.Y.2d 953, 597 N.Y.S.2d 938 (1993), *leave to app. denied*, 82 N.Y.2d 655, 602 N.Y.S.2d 804 (1993).[5]

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[5] As in *Dawson* (see page 6, above), in *Sobel* the Court of Appeals denied a direct appeal as of right from the trial court

But in the face of *Yee*'s warning regarding compelled tenancies, the tenancies that were "perpetual" in *Sobel* suddenly became perpetual no more; instead, they now could be supposedly terminated by "a number of events", and it was the Dawsons' burden "to make a showing that these contingencies cannot occur". *Dawson*, 610 N.Y.S.2d at 206, App. 9a, 10a.

The court gave six examples of such events: 1) the tenant's death; 2) the tenant's violation of a significant tenancy obligation; 3) the tenant committing or permitting a nuisance; 4) the tenant allowing an illegal or immoral use of the unit; 5) the landlord demolishing or significantly altering the house; and 6) the landlord withdrawing from the market upon showing the inability to earn a minimum return on the property. *Id.*

The first four of these events involved factors that were beyond Ms. Dawson's control—instead, they rested solely in the hands, or fate, of the tenants.[6] The fifth alternative—demolition or significant alteration of the house—would have required Ms. Dawson to destroy or alter the very house that she sought to make into her home. The sixth alternative—eviction on grounds of financial hardship—would have involved a lengthy and

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"upon the ground that questions other than the constitutional validity of a statutory provision are involved." 79 N.Y.2d 822, 580 N.Y.S.2d 192 (1991). As in *Dawson*, in *Sobel* there were in fact no non-constitutional questions.

[6] Even in the case of the tenant's death, some other person might well take over the unit under New York State's recently enlarged definition of the "family members" who are entitled to succeed to a rent-controlled unit. "It is virtually certain that long, successive successorships to rent stabilized leaseholds will not be just theoretical possibilities because, markets being markets, they are likely to bloom as perennials, becoming functionally transformed into perpetual stakeholds." *Rent Stabilization Assoc. v. Higgins*, 83 N.Y.2d 156, ——, 608 N.Y.S.2d 930, 939 (1993) (Bellacosa, J., concurring), *cert. denied*, 114 S.Ct. 2693 (1994).

uncertain agency proceeding which did not guarantee eviction even if Joan Dawson met its rigid requirements.[7]

In short, none of these were viable means by which Joan Dawson could have terminated her tenancies. Instead, they were largely events for which she would simply have had to sit and wait, just as she might wait for her house to be hit by a meteorite (another hypothetical that, by the court's logic, would supposedly demonstrate the terminable nature of these tenancies).

The Appellate Division also attempted to distinguish between perpetual tenancies and those "of indefinite duration". 610 N.Y.S.2d at 206, App. 10a, *quoting Rent Stabilization Assoc. v. Higgins*, 83 N.Y.2d 156, 608 N.Y.S.2d 930 (1993), *cert. denied*, 114 S.Ct. 2693 (1994). But this distinction simply does not survive scrutiny; in the context of legal compulsion, the two terms are identical for all pracitcal purposes—they both involve an unbounded legal compulsion that accomplishes exactly what *Yee* forbids.

The end result was the total destruction of Ms. Dawson's right to exclude outsiders from the most private and intimate form of property—her own house. In the Appellate Division's view, this was merely a "minimal restriction." 610 N.Y.S.2d at 208, App. 15a. But

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[7] Economic hardship requires showing both "no reasonable possibility" of an 8 and 1/2 percent return on the property's assessed value, and the absence of willful mismanagement by both the landlord and her "immediate predecessor". 9 N.Y.C.R.R. § 2204.4(g) (65 McKinney Unconsol. Laws 1987). Even if this showing is made, "eviction is not the only remedy available". *Ziman v. Division of Housing and Community Renewal*, 544 N.Y.S.2d 147, 150 (1st Dept. 1989) (Ellerin, J., dissenting on other grounds), *aff'd*, 76 N.Y.2d 721, 557 N.Y.S.2d 876 (1990). Most importantly, the Dawsons' complaint expressly alleged that they were prevented from evicting their tenants by the owner-occupancy ban. Verified Complaint, para. 10 and 31. The fair reading of this is that Joan Dawson could not have satisfied the criteria for economic hardship, an implication further supported by the fact that, ultimately, she ended up paying her tenants to leave.

"choices concerning family living arrangements" are entitled to heightened protection." *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977). The right to live in one's own property is no less basic than "the right to build on one's own property". *Nollan*, 483 U.S. at 834 n.2. Its exercise cannot be conditioned on scenarios as speculative as those set forth by the court. In the words of this Court, the right to exclude "cannot be so easily manipulated." *Loretto*, 458 U.S. at 439 n.17.

B. The Supreme Court Has Recognized A Landlord's Constitutional Right To Cease Renting Even In The Context Of Rent Control—A Ruling That The Decision Below Totally Ignores

The Appellate Division rested much of its case on the states' "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." 610 N.Y.S.2d at 205, App. 6a, *quoting Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988). But regardless of what validity rent control in general may have, it enjoys no categorical exemption from takings law—an action which constitutes a taking in a *non*-rent control context is not magically absolved when it takes place under rent control. There is no basis for contending, for example, that a landlord's "traditional right to evict a tenant in order to occupy a rental unit personally" (*Fresh Pond*, 464 U.S. at 876) vanishes if the unit is rent-controlled. As this Court itself noted of its decisions upholding landlord-tenant regulation, "[i]n none of these cases . . . did the government authorize the permanent occupation of the landlord's property by a third party." *Loretto*, 485 U.S. at 440.

In fact, the Supreme Court has made it clear that the right to exclude is as basic to rent-controlled property as it is to any other. The federal Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C. App. § 901 *et seq.*, on which New York's rent control statute is based, im-

posed rent control in federally-designated military defense areas. In rejecting a takings challenge to this act, the Supreme Court emphasized that the law did not restrict a landlord's ability to cease renting:

> "We are not dealing here with a situation which involves a 'taking' of property. *Wilson v. Brown* [137 F.2d 348 (Emer. Ct. App. 1943)]. By § 4(d) of the Act it is provided that 'nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.' There is no requirement that the apartments in question be used for purposes which bring them under the Act." *Bowles v. Willingham,* 321 U.S. 503, 517 (1944).

The *Wilson* decision cited by the Court made this constitutional connection even clearer:

> "[T]he Act does not require the landlord to continue his property in the market for housing accommodations. . . . In accordance with this statutory provision . . . a landlord may evict a tenant whose lease has expired if he 'seeks in good faith not to offer the housing accommodations for rent.' *The landlord is thus free to occupy the property himself,* or devote it to some commercial enterprise, or utilize it in any other way. *This serves to emphasize that there has been no 'taking' of his property in the constitutional sense.*" *Wilson,* 137 F.2d at 352 (emphasis added).

This same absence of compulsion under the federal act was reemphasized by the Supreme Court in yet another case: "The present statute is not open to the objection that petitioners are *compelled* to serve the public . . . ." *Yakus v. United States,* 321 U.S. 414, 437 (1944) (concerning the application of the federal act to beef wholesalers) (emphasis added).

In fact, the New York Court of Appeals itself once reiterated this view, noting that

> "the Supreme Court had suggested [in *Bowles*] that there was an *absolute right* in an owner to evict ten-

> ants so as to use his property for uses not covered by the act." *New York University v. Temporary State Housing Rent Commission,* 304 N.Y. 124, 127, 106 N.E.2d 44, 46 (1952) (emphasis added).

The state court went on to comment on the dubious validity of restricting this right to evict:

> "To allow the commission to impose further requirements of hardship, necessity, etc. *would seem . . . to be of doubtful constitutionality,* as prohibiting a landlord from turning his own property into a nonrental use." *Id.* at 130, 106 N.E.2d at 47 (emphasis added).

Joan Dawson was barred from turning her property into the most personal, most fundamental, least objectionable "nonrental use" imaginable—that of creating a home for her family. In upholding this result, the Appellate Division did not so much as mention the above line of cases, let alone bother to distinguish them.

II. THE DECISION BELOW CREATES A SPLIT AMONG STATE HIGH COURTS ON THE ISSUE OF OWNER OCCUPANCY

The Court of Appeals' effective affirmance of Joan Dawson's predicament stands in sharp contrast to the decisions of two other state high courts. In Massachusetts, a similar retroactive bar to owner occupancy, as applied to a person who had purchased intending such use, was held to constitute a taking by the state's highest court:

> "Here . . . the owner purchased with the reasonable belief that Ordinance 926 conferred upon her the right to buy her unit and remain in it. If Ordinance 980 were to be applied retroactively, it would thereby interfere with the plaintiff's primary expectation concerning the use of the property. . . .
>
> ". . . . The board would physically exclude her from living in her unit as owner, and would require

> that the unit be made available for physical occupation by a tenant. If the board were to exclude her from her property in this way, there would be a taking for which she would be entitled to just compensation." *Polednak v. Rent Control Board of Cambridge*, 397 Mass. 854, 861-62, 494 N.E.2d 1025, 1030 (1986) (footnote omitted).

Similarly, the Washington Supreme Court struck down a city restriction on houseboat evictions by moorage owners. The ordinance made it "impossible for the houseboat owner to be evicted and impossible for the owner of the moorage to use the moorage for the owner's residence." *Kennedy v. City of Seattle*, 94 Wash. 2d 376, 386, 617 P.2d 713, 719 (1980). Unlike the Appellate Division in *Dawson*, the Washington Supreme Court did not allow the possibility of evictions based on other legal violations to obscure the moorage owner's dilemma. *Id.*

In a subsequent case that reached the same result, the Washington Supreme Court distinguished between valid land use regulations that "prohibited *everyone* from using the land" and the invalid ordinance before it, under which "the landlord is prohibited from the intended use of the property, but not the tenant." *Granat v. Keasler*, 99 Wash. 2d 564, 570, 663 P.2d 830, 833 (1983) (emphasis in original).[8]

In short, *Dawson* conflicts not only with decisions of this Court, but also with those of other state courts of last resort. Supreme Court Rule 10.1(b).

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[8] Both the Massachusetts and the Washington decisions involved interpretations of the Fifth Amendment. In *Polednak*, the court rested its holding on *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and on *Flynn v. City of Cambridge*, 383 Mass. 152, 418 N.E.2d 335 (1981). *See Polednak*, 395 Mass. at 861, 494 N.E.2d at 1030. *Flynn*, in turn, based its constitutional analysis solely on U.S. Supreme Court decisions. *See* 383 Mass. at 160-61, 418 N.E.2d at 339-40.

The *Kennedy* decision is based on both the Fifth Amendment and the state constitution. *See* 94 Wash. 2d at 384, 617 P.2d at 719.

III. AT THE TIME JOAN DAWSON BOUGHT HER HOUSE, SHE LEGITIMATELY EXPECTED TO BE ABLE TO EVICT HER TENANTS; NEW YORK'S DESTRUCTION OF THAT EXPECTATION IN THE NAME OF PROTECTING LONG-TERM TENANTS CONSTITUTES A REGULATORY TAKING

A. Despite The Fact That Joan Dawson Bought A Rent-Controlled Brownstone In The City Of New York, Her Expectation Of Evicting Her Tenants Was Fully Legitimate

Independently of whether Joan Dawson suffered a physical taking, it is clear that "interference with reasonable investment backed expectations" can constitute a taking of a different sort—a regulatory taking. *Kaiser Aetna,* 444 U.S. at 175. In denying this claim, the Appellate Division dismissed Ms. Dawson's expectation of evicting her tenants as unreasonable:

> "[P]laintiffs purchased a premises knowing that it was subject to rent control, a system under which landlord-tenant relationships are highly regulated and the continuing trend has been toward tenant protection. No one could reasonably expect that the regulatory scheme then in effect would remain fixed in all its permutations." 610 N.Y.S.2d at 207-08, App. 13a.

As shown above, however, the right to occupy one's property is more than a mere "permutation" of rent control law—it is a fundamental constitutional element. For this reason, owner-occupancy evictions provisions are "founded on what is considered to be a basic right of ownership . . . ." Barr, *Guidelines For Drafting Rent Control Laws—Lessons of a Decade,* 35 Rutgers L. Rev. 723, 834 (1983).

Joan Dawson's expectation was, moreover, based on explicit New York law. It thus met the two key criteria of legitimacy set out in *Lucas*: it was based on "a rich tradition of protection at common law" and it had "been shaped by the State's law of property". 112 S.Ct. at 2894

n.7. It cannot simply be swept away by the supposedly fluid nature of rent control regulation.

Joan Dawson was fully entitled to rely on the New York statute which codified this right and which was in effect when she purchased her house. Hers was precisely the type of reliance that the Supreme Court had in mind when it noted "the importance of honoring reasonable expectations in property rights." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482 (1988). New York's "decision to arbitrarily switch back and forth" in its recognition of this right is exactly the sort of flip-flop that, in the field of takings jurisprudence, "raise[s] serious constitutional questions." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989) (discussing the constitutional parameters of public utility rate regulation).[9]

More than seventy years ago, Justice Holmes pointed out that the Fifth Amendment's compensation requirement is intended to check "the natural tendency of human nature . . . to extend [regulation] more and more until at last private property disappears." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), *quoted* in *Lucas*, 112 S.Ct. at 2893. In New York, rent control's "continuing trend" of growth (610 N.Y.S.2d at 207, App. 13a) is the regulatory personification of this human tendency.

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[9] The Appellate Division characterized Joan Dawson's expectation as "speculative" because she might not have been able to meet other statutory criteria for eviction. 610 N.Y.S.2d at 208, App. 13a. However, the Dawsons had expressly alleged that the owner-occupancy eviction ban prevented them from taking possession of the rental units. Verified Complaint, para. 10 and 31. On respondents' motions for summary judgment, this allegation should have been favorably construed to indicate that, had they been allowed to proceed with their applications, they would have met the other criteria for eviction. *See, e.g., Pantote Big Alpha Foods, Inc. v. Schefman*, 121 A.D.2d 295, ——, 503 N.Y.S.2d 58, 59 (1st Dept. 1986). With the eviction ban in place, the Dawsons were absolutely barred from proceeding.

In relying on that trend to deny compensation to Joan Dawson, the Appellate Division got it backwards in the most fundamental sense.

B. New York's Interest In Giving Special Treatment To Long-Term Tenants Does Not Justify Denying The Dawsons The Right To Make Their House Their Home

The Dawsons' inability to fully occupy their house under Ch. 234 is a taking on another ground as well—Ch. 234's protection of long-term tenants, at the expense of landlords who wish to occupy their units, serves no substantial government purpose.

Ch. 234 protects three categories of tenants from owner-occupancy evictions: the elderly, the disabled, and long-term tenants. These categories are not inextricably entwined; the elderly and the disabled would have been protected by Ch. 234 even if that law *not* covered long-term tenants. Long-term tenants, on the other hand, receive special protection even if they are healthy and rich. Thus, in evaluating New York's interest in favoring long-term tenants, the considerations involved in state protection of elderly and disabled tenants can be put aside. Viewed in this light, there is no substantial government interest served by Ch. 234's protection of long-term tenants as a special class in themselves.[10]

The legislative history of Ch. 234 noted the physical difficulty of eviction for the elderly and disabled. It said

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[10] It is ironic that Ch. 234 gave Joan Dawson's tenants a greater right to intrude on her property than that of soldiers serving their country. The Third Amendment to the U.S. Constitution states: "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner . . . ." These "property-based privacy interests protected by the Third Amendment" are "recognized and permitted by society as founded on lawful . . . possession with a legal right to exclude others." *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982).

nothing, however, as to why long-term tenants who are *not* elderly or disabled will face some hardship greater than other evicted tenants. According to one report,

> "[e]viction is a serious hardship for senior citizens, long term tenants, and the disabled. Moving often means harmful amounts of physical effort for senior citizens and may be nearly impossible for the disabled. In the present housing market, renting a new apartment can be financially devastating to a person on a retirement or limited income." Memorandum of Assemblyman R.N. Gottfried, 1984 N.Y.S. Legislative Annual 109.

Another report was similarly vague on why long-term tenants needed such favored status:

> "[L]ong-term tenants of two decades are often elderly, although not 62 years of age, and have limited incomes. These tenants, by virtue of their longevity, have become an integral part of their community . . . . [F]orcing them out of their housing accommodations after 20 years could have a devastating effect on them and their community." Budget Division, Report on Bill No. 3586-B at 2 (1984).

If the state wished to protect elderly tenants who were "not 62 years of age", then it could have lowered Ch. 234's age threshold. If it wished to protect tenants with limited incomes, it could have adopted a financial means test. *See, e.g., Pennell,* 485 U.S. 1. Instead, New York decided to award this preferential status solely on the basis of how long tenants have been "an integral part of their community"—in short, on the duration of their residence.

This Court, however, has repeatedly rejected durational residence as a basis for unequal state treatment. In *Vlandis v. Kline,* 412 U.S. 441, 450 (1973), the Court rejected a state's "asserted interest in favoring established residents over new residents" in setting state university tuition fees. In *Shapiro v. Thompson,* 394 U.S. 618

(1969), the Court struck down a one-year residency requirement for welfare assistance, rejecting any "attempt to distingiush between new and old residents on the basis of the contribution they have made to the community . . . ." *Id.* at 632. In *Zobel v. Williams,* 457 U.S. 55 (1982), the Court rejected Alaska's plan to distribute oil royalty dividends to its citizens in amounts based on their length of in-state residency. In the Court's words, this "could open the door to state apportionment of other rights, benefits, and services according to length of residency." *Id.* at 64 (footnote omitted).

Similarly, New York's attempt to give civil service preference to veterans who were state residents at the time they entered the military was overturned on equal protection grounds in *Attorney General of New York v. Soto-Lopez,* 476 U.S. 898 (1986).

The constitutional grounds for these decisions were equal protection and the right to travel. In the context of property use restrictions, a similar inquiry is necessary into the legitimacy of the asserted state interest and of the means chosen to advance it. As the Supreme Court stated in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 127 (1978), "a use restriction on real property may constitute a taking if not reasonably necessary to the effectuation of a *substantial* public purpose." (Emphasis added.)

C. In Imposing The Social Burden Of Housing Selected Classes Of Tenants On Individual Landlords Such As Joan Dawson, Based Only On The Accident Of Occupancy, New York Violated The Constitutional Requirement That Public Burdens Be Borne By The Public, Rather Than By Haphazardly Selected Individuals

Even if one assumes that New York has a legitimate interest in favoring long-term tenants, its method for advancing that interest violates constitutional requirements

of fairness. Rather than make the public pay for this social goal, New York has imposed the cost on the Dawsons and landlords like them, who wish to live in units that happen to be occupied by these tenants. It is hard to imagine a more arbitrary method for a legislature to dodge the costs of its social programs.

The constitutional guarantees of due process and just compensation are intended to prevent individuals from being forced to "surrender to the public something more and different from that which is exacted from other members of the public." *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 325 (1892). Those guarantees prohibit "loading upon one individual more than his just share of the burdens of government." *Id.* The ban on uncompensated takings "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

The New York Court of Appeals has itself recognized the fundamental unfairness of such government attempts to conceal the social costs of social goals. In invalidating the rezoning of a private park into a public one, it stated:

> "The ultimate evil of a deprivation of property . . . under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefited, that is, society at large. Instead, the accident of ownership determines who shall bear the cost initially. Of course, as further consequence, the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding . . . . When [the social cost is] successfully concealed, the public is not likely to have any objection to the 'cost-free' benefit." *Fred F. French Investing Co. v. City of*

New York, 39 N.Y.2d 587, 596-97, 385 N.Y.S.2d 5, 11 (1976).

Ch. 234 commits this same injustice. Having designated certain classes of tenants as deserving special status for the public good, it then avoids making the public pay even a penny of the subsequent cost. Instead the tab is arbitrarily imposed on Joan Dawson and other unlucky landlords—an action which, "even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause." *Nollan*, 483 U.S. at 835 n.4.

New York's legislative legerdemain may be fiscally attractive and politically expedient, but it is not constitutional.

IV. IN FORCING THE DAWSONS TO ACT AS LANDLORDS FOR OVER A DECADE, NEW YORK VIOLATED THEIR RIGHT TO DUE PROCESS

New York's enactment of Chapter 234 transformed Joan Dawson into an unwilling landlord who could not go out of business until she paid her tenants to leave. For over a decade, she was forced to comply with countless legal requirements, ranging from building code provisions to landlord liability rules—all in a profession in which she never intended to remain, in a house which she rightfully expected to convert into a home for her family alone. This forced imposition of an occupation upon her, based solely on the accident of how long her tenants had lived in their units, violated Ms. Dawson's right to due process.

The choice to enter or leave an occupation is among the most basic decisions that a person can make. It intimately affects everything from one's daily activities to the direction and nature of one's career. The right to make such choices is clearly "implicit in the concept of ordered liberty" that is central to individual freedom. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

A command by the state that one enter and remain in a specified occupation violates this liberty. In the Supreme Court's words, the

> "proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent." *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263, 270 (1965).

See, e.g., Frost & Frost Trucking Co. v. R.R. Commission, 271 U.S. 583 (1926) (state attempt to force common carrier status on private trucking firm violates due process). As one federal appeals court stated, "[t]here would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will." *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 867 (D.C. Cir. 1972).[11]

The Appellate Division dismissed this issue as "frivolous", declaring that the Dawsons "need only sell their building to escape the minimal restrictions placed on them by the challenged provisions." 610 N.Y.S.2d at 209, App. 15a. But it is constitutionally outrageous to suggest that Joan Dawson "need only sell" her home in order to escape compulsory landlordship. In *Loretto*, this Court held that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation . . ." 102 S.Ct. at 3178; it is no less true that Joan Dawson's ability to *cease* renting may not be conditioned on her giving up her home.

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[11] *See also Family Division Trial Lawyers v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) ("Inability to avoid continued service is the essential ingredient of involuntary servitude."); *United States v. Mussry*, 726 F.2d 1448, 1454 n.6 (9th Cir. 1984) ("Even though a person may come to a job voluntarily, subsequent coerced service constitutes involuntary servitude.").

New York's attempt to force Ms. Dawson to remain a landlord violated not only her personal liberty, but also her due process right to be free of arbitrary restrictions on her property. The "fourteenth amendment's due process clause protects property no less than life and liberty . . . ." *Sinaloa Lake Owners Assn. v. City of Simi Valley*, 882 F.2d 1398, 1408-09 (9th Cir. 1989). The Second Circuit has described how such claims are to be addressed:

> "In evaluating a landowner's claim that a denial of a permit for a regulated use of land offends the landowner's right to substantive due process under the 'arbitrary and capricious' government conduct theory, a court first asks whether 'an entitlement exists in what has been applied for . . . .' " *Southview Associates v. Bongartz*, 980 F.2d 84, 101 (2d Cir. 1992), (Oakes, Chief J., concurring), *quoting RRI Realty Corp. v. Southhampton*, 870 F.2d 911, 917 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989).

Given her well-founded expectation of being able to evict her tenants (see pages 18-19, above), Joan Dawson clearly possessed such an entitlement. Even if one assumes Ch. 234's validity with respect to buildings purchased after its enactment, New York's after-the-fact destruction of Ms. Dawson's entitlement cannot pass muster: "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 112 S.Ct. 1105, 1112 (1992).

The purchase of property is not illegal in New York, nor is it illegal to attempt to establish a home. In forcing Joan Dawson to act as a landlord for over a decade merely because she innocently attempted to create a home for her family, New York deprived her of her due process rights to both property and liberty.

CONCLUSION

When Joan Dawson bought her brownstone in 1983, she had a clearly legitimate expectation of being able to use the owner-occupancy eviction law so that she and her family could fully occupy it as their home. New York State destroyed that expectation, imposing decade-long compelled tenancies that ended only when Ms. Dawson bought out her tenants.

The Court of Appeals' one-sentence dismissal of her case, which effectively affirmed the Appellate Division's decision on the merits, contradicts basic rulings of this Court and conflicts with decisions by two other state courts of last resort on a major issue of property rights.

For this reason, and for the other reasons set forth above, a writ of certiorari should issue to review the order of the New York State Court of Appeals.

Respectfully submitted,

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October 5, 1994

APPENDIX

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of July 1994.

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 805 SSD 54

JOAN DAWSON, *et al.*,
Appellants,

v.

RICHARD L. HIGGINS, Commissioner of the New York Division of Housing and Community Renewal, *et al.*,
Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that the issues presented have become moot.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

SUPREME COURT
APPELLATE DIVISION
FIRST DEPARTMENT

JOAN DAWSON, PAUL DAWSON and TANDRA DAWSON,
Plaintiffs-Appellants,

v.

RICHARD L. HIGGINS, Commissioner of the New York Division of Housing and Community Renewal and THE CITY OF NEW YORK,
Defendants-Respondents.

April 5, 1994

Before SULLIVAN, J.P., and ELLERIN, ASCH and TOM, JJ.

SULLIVAN, Justice.

This is an appeal from the rejection of a challenge to the constitutionality of section 26-408(b)(1) of the New York City Administrative Code and section 2204.5(a) of the Rent and Eviction Regulations of the New York State Division of Housing and Community Renewal (9 NYCRR § 2204.5[a]), which, insofar as relevant, prohibit a landlord's recovery of a rent-controlled housing accommodation for his or her family's use where a member of the household lawfully occupying the accommodation has been a tenant in the building for twenty years or more, on the ground that the enforcement of said provi-

sions subjects the landlord to a compelled tenancy constituting a physical and regulatory taking of property and a violation of due process and the prohibition against involuntary servitude.

The facts, while sparse, are undisputed. In November 1983, plaintiff Joan Dawson, aware that the building housed two rent-controlled tenants, purchased the premises in question, a five-story brownstone at 240 Lenox Avenue in Manhattan. Joan Dawson resides in the building, as do her two adult children, plaintiffs Paul and Tandra Dawson, who live on separate floors. Tandra's daughter and Joan Dawson's two foster children also reside in the building. The Lenox Avenue brownstone is Joan Dawson's only real property.

The two tenants, neither a party to this action, have lived in the premises since 1970. The record is silent as to whether they are disabled or elderly, the precise duration of their tenancy, their expected or likely continued occupancy in the building, the amount of rent they pay or the effect eviction might have on them. Under New York law in effect at the time of purchase, these tenants could have been evicted, assuming that the other statutory prerequisites for such eviction could have been met, so that Joan Dawson and her family could occupy the units for themselves. (*See*, Administrative Code, former § Y51-6.0[b][1], recodified in 1986 as 26-408[b][1].)

Rent-controlled residential units in New York City are simultaneously governed by local and state law and regulations. On the state level, the Legislature, in 1962, enacted the Local Emergency Housing Rent Control Act (L.1962, ch. 21, codified at Unconsol. Laws §§ 8601-8617), authorizing New York City to enact and administer its own rent control program. Pursuant to this enabling legislation, the City Council enacted Local Law 20 of 1962, the New York City Rent and Rehabilitation Law (originally Administrative Code §§ Y 41-1.0 *et seq.*, now §§ 26-401 *et seq.*) In 1983, the Legislature enacted

the Omnibus Housing Act (L.1983, ch. 403), which transferred the administration of all rent-controlled housing to the New York State Division of Housing and Community Renewal (DHCR). New York City's then existing rent and eviction regulations became DHCR's regulations (*id.*, § 28), which are set forth in 9 NYCRR Parts 2200 *et seq.*, incorporated in Unconsolidated Laws §§ 8581 *et seq.*

The Rent and Rehabilitation Law and DHCR regulations permit a landlord to seek a tenant's eviction and the recovery of a rent-controlled housing accommodation in a number of circumstances, including, *inter alia*, a tenant's violation of a substantial obligation of the tenancy; a subtenant's occupancy of the accommodation after the lease expiration; where, subject to certain conditions, possession is sought for the purpose of demolishing or substantially altering the premises; and, where the landlord wants to withdraw the premises from the market on the ground that its continued operation would impose undue hardship, and the rent regulatory agency finds there is no reasonable possibility that the landlord could realize a net annual return of 8½% of the property's assessed value and there has not been any intentional or willful management of the property to impair the ability to realize such a return. (Administrative Code § 26-408; 9 NYCRR § 2204.) The Rent and Rehabilitation Law and DHCR regulations also authorize the eviction of tenants where the landlord seeks to recover possession of the housing accommodation for his or her personal use or the personal use of his or her family and the landlord can show a good faith, immediate and compelling need. (Administrative Code § 26-408[b][1]; 9 NYCRR § 2204.5[a].)

Seven months after Joan Dawson bought the brownstone, on June 19, 1984, the owner-occupancy eviction provisions of the rent control laws (*id.*) were amended. (L.1984, ch. 234, § 1.) Under the amendment, effective immediately, tenants 62 years of age or older, or disabled,

or who had resided in the building for 20 years or more could no longer be evicted for reasons of owner occupancy. The amendment applied to "any tenant in possession at or after the time it takes effect. . . ." (*Id.*, § 4.) Since the two tenants in the Lenox Avenue brownstone came under the amendment's 20-year tenancy provision, they were no longer subject to eviction on owner-occupancy grounds.

On August 29, 1990 Joan Dawson and her two children commenced this action against both the City and DHCR, challenging the 20-year residency bar to eviction as a physical as well as regulatory taking and a due process violation under both the federal and state constitutions and as constituting involuntary servitude under the federal constitution. After both defendants answered, each asserting the failure to state a cause of action, plaintiffs moved for summary judgment seeking a declaration of unconstitutionality. Both defendants separately cross-moved for summary judgment declaring the challenged statute and regulations constitutional.

In a well reasoned and comprehensive decision essentially distinguishing the major cases invalidating housing regulations on takings grounds, such as *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059, *cert. den. sub nom Wilkerson v. Seawall Assocs.*, 493 U.S. 976, 110 S.Ct. 500, 107 L.Ed.2d 503 and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868, on the ground that these cases did not involve, as here, pre-existing relationships voluntarily assumed by the property owner, the IAS court rejected all of plaintiffs' claims and declared the challenged provisions to be constitutional, 154 Misc.2d 811, 588 N.Y.S.2d 93. Plaintiffs filed a direct appeal to the Court of Appeals pursuant to CPLR 5601(b)(2) on the ground that the only issue presented involved the constitutionality of state legislation. The Court of Appeals transferred the appeal to this

court. (*See*, N.Y. Const.Art. 6, §§ 3[b][2], 5[b]; CPLR 5601[b][2].) We affirm.

Two provisions of the United States Constitution, the 14th Amendment's due process clause and the 5th Amendment's takings clause,[1] protect property interests against governmental interference. In addition, under the New York State Constitution, no person may be deprived of his or her property without due process of law (Art. 1, § 6) and private property may not be taken for public use without just compensation (Art. 1, § 7[a]). Despite these constitutional protections, property rights are not, however, absolute. They have long been subject to restrictions, for which there is no compensation, through the state's exercise of its police power in prescribing regulations "to promote the health, peace, morals, education, and good order of the people." (*Barbier v. Connolly*, 113 U.S. 27, 31, 5 S.Ct. 357, 359, 28 L.Ed. 923.) "Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. * * * These restrictions are 'properly treated as part of the burden of common citizenship'." (*Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491, 107 S.Ct. 1232, 1245, 94 L.Ed.2d 472 quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5, 69 S.Ct. 1434, 1437, 93 L.Ed. 1765.)

In the context of a landlord-tenant relationship the Supreme Court has noted that the states have " 'broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.' " (*Pennell v. City of San Jose*, 485 U.S. 1, 12 n. 6, 108 S.Ct. 849, 857 n. 6, 99 L.Ed.2d 1, quot-

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[1] The taking without just compensation clause of the 5th Amendment is applicable to the states through the 14th Amendment. (*See, Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236, 17 S.Ct. 581, 584, 41 L.Ed. 979.

ing *Loretto v. Teleprompter Manhattan CATV Corp., supra*, 458 U.S. at 440, 102 S.Ct. at 3178.) Similarly, in *Seawall Assocs. v. City of New York, supra*, 74 N.Y.2d at 112 n. 11, 544 N.Y.S.2d 542, 542 N.E.2d 1059, the Court of Appeals noted that "government has considerable latitude in regulating landlord-tenant relationships to preclude eviction in hardship, emergency and rent-control cases." Over the years, the government, at the federal, state and local level, has, in response to housing shortages, enacted legislation declaring the existence of a serious public emergency and restricting a landlord's right to raise rents and evict tenants. The courts have consistently upheld these restrictions and rejected claims of a taking without just compensation. (*See, e.g., Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 [upheld federal legislation fixing maximum rents in "defense-rental" areas]; *Spring Realty Co. v. New York City Loft Board*, 69 N.Y.2d 657, 511 N.Y.S.2d 830, 503 N.E.2d 1367 *app. dism'd*, 482 U.S. 911, 107 S.Ct. 3179, 96 L.Ed.2d 668 [legislation protecting loft residents held not to constitute a taking]; *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 996, 431 N.Y.S.2d 475, 409 N.E.2d 948, *app. dism'd sub nom, Benson Realty Corp. v. Koch*, 449 U.S. 1119, 101 S.Ct. 933, 67 L.Ed.2d 106 [rejected claim that continuation of New York City rent control law effects an unconstitutional taking]; *see, also, Bucho Holding Co. v. Temporary State Housing Rent Comm.*, 11 N.Y.2d 469, 230 N.Y.S.2d 977, 184 N.E.2d 569, *I.L.F.Y. Co. v. Temporary State Housing Rent Comm.*, 10 N.Y.2d 263, 268, 219 N.Y.S.2d 249, 176 N.E.2d 822, *app. dism'd*, 369 U.S. 795, 82 S.Ct. 1155, 8 L.Ed.2d 285; *Teeval Co. v. Stern*, 301 N.Y. 346, 362, 93 N.E.2d 884, *cert. den.*, 340 U.S. 876, 71 S.Ct. 122, 95 L.Ed. 637; *Loab Estates v. Druhe*, 300 N.Y. 176, 180, 90 N.E.2d 25; *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429, 130 N.E. 601.)

A physical taking occurs where governmental action results in the permanent physical occupation, either by

the government itself or a private, government-authorized party, "to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." (*Loretto v. Teleprompter Manhattan CATV Corp., supra*, 458 U.S. at 434-435, 102 S.Ct. at 3175.) In *Nollan v. California Coastal Commn.*, 483 U.S. 825, 832, 107 S.Ct. 3141, 3146, 97 L.Ed.2d 677, the Supreme Court held that the government's grant of "a permanent and continuous right" to pass across private property constituted a physical occupation.

In *Sobel v. Higgins*, 188 A.D.2d 286, 590 N.Y.S.2d 883, *app. dism'd*, 81 N.Y.2d 953, 597 N.Y.S.2d 938, 613 N.E.2d 970, *lv. denied*, 82 N.Y.2d 655, 602 N.Y.S.2d 804, 622 N.E.2d 305, this court rejected a taking argument identical to the one being made here. There, a landlord sought to withdraw housing accommodations from the rental market but was precluded by rent control provisions, the same as those being challenged in the instant matter, giving rent-controlled tenants the right to remain in possession by reason of age or duration of occupancy. This court rejected the claim of a physical taking, finding that there was "hardly" a permanent physical occupation by a stranger or third party since the tenants were, as here, already residing in the premises at the time the landlord purchased the property. (*See, also, Sourian v. Higgins*, 170 A.D.2d 258, 566 N.Y.S.2d 241; *McMurray v. DHCR*, 135 A.D.2d 235, 524 N.Y.S.2d 693, *aff'd*, 72 N.Y.2d 1022, 534 N.Y.S.2d 924, 531 N.E.2d 645; *Lopez v. Mirabel*, 127 A.D.2d 771, 512 N.Y.S.2d 164; *Lavalle v. Scruggs-Leftwich*, 133 A.D.2d 313, 519 N.Y.S.2d 218.)

Despite this seemingly dispositive body of case law, plaintiffs argue that the Supreme Court's decision in *Yee v. City of Escondido*, —— U.S. ——, 112 S.Ct. 1522, 118 L.Ed.2d 153 and the Court of Appeals' decision in *Seawall Assocs. v. City of New York, supra*, 74 N.Y.2d

92, 544 N.Y.2d 542, 542 N.E.2d 1059 mandate a different result. *Yee* involved the interplay between a local rent control ordinance and California's Mobile-home Residency Law, which limited the bases on which the owners of mobile home parks may terminate the tenancy of mobile home owners who rent the "pads" on which the homes are placed and generally prohibited the park owner from requiring the removal of a home when it is sold. Petitioners, park owners, contended that the rent control ordinance, when viewed against the backdrop of the Mobilehome Residency Law, resulted in a physical taking of their property. The court rejected this claim on the ground that in accordance with the Mobilehome Residency Law "a park owner who wishes to change the use of his land may evict his tenants." (—— U.S. at ——, 112 S.Ct. at 1528.) The *Yee* court did note, however, and it is on his caveat that plaintiffs premise their argument, that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy" (*id.* at ——, 112 S.Ct. at 1529). The rent-control provisions at issue, however, plainly do not require a landlord to remain in the rental market in perpetuity.

Notwithstanding the fact that 20-year tenants cannot be evicted for the personal use of the landlord or his or her family, the occurrence of a number of events would allow the landlord to recover such a tenant's housing accommodation. For instance, the landlord might recover the unit upon the tenant's death or upon the tenant's violation of a substantial obligation of the tenancy, or in instances where the tenant is committing acts constituting a nuisance or permitting the same or permitting the accommodation to be used for immoral or illegal purposes; or upon the landlord's decision to demolish or substantially alter the premises or to withdraw the premises from the rental market where there is no reasonable possibility or realizing a net annual return of 8½% of the property's as-

sessed value. (*See*, Administrative Code § 26-408; 9 NYCRR § 2204.) Plaintiffs have failed to make a showing that these contingencies cannot occur and thus are unable to show that the amended owner-occupancy provisions have created perpetual tenancies. As the Court of Appeals has noted, "That a rent-regulated tenancy might itself be of indefinite duration—as has long been the case under rent control and rent stabilization—does not, without more, render it a permanent physical occupation of property [citation omitted]." (*Rent Stabilization Assn. of NY City v. Higgins*, 83 N.Y.2d 156, 608 N.Y.S.2d 930, 630 N.E.2d 626.)

In *Seawall Assocs. v. City of New York, supra*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059, the Court of Appeals held that a local law which required owners who purchased investment properties to rehabilitate and rent vacant units for single-room occupancy—a use neither planned nor desired—constituted a physical taking and violated both the state and federal constitution. In so holding, however, the court went out of its way to distinguish the local law at issue and those that affected tenant-occupied property, noting: "The rent-control and other landlord-tenant regulations that have been upheld by the Supreme Court and this court merely involved restrictions imposed on existing tenancies where the landlords had voluntarily put their properties to use for residential housing. Unlike Local Law No. 9, however, those regulations did not force the owners, in the first instance, to subject their properties to a use which they neither planned nor desired. . . . By sharp contrast . . . Local Law 9. . . . requires owners to rehabilitate and offer their properties for rent, as SRO units, to persons with whom they have no existing landlord-tenant relationship" (*Id.* at 105-06, 544 N.Y.S.2d 542, 542 N.E.2d 1059.) Thus, the Court of Appeals has drawn a sharp distinction with respect to the takings clause between regulation that protects the current tenant, which is generally permissible, and regulation that subjects the property to a use never

intended, i.e., a landlord-tenant relationship, such as to constitute a physical taking. The challenged provisions fall into the former category.

Plaintiffs also claim a regulatory taking. Concededly, certain governmental action affecting private property may constitute a taking even if it does not result in the physical occupation of the property. (*Yee v. City of Escondido, supra*, —— U.S. at ——, 112 S.Ct. at 1526.) Courts, however have never found such a taking merely because a regulation deprives an owner of the most profitable or beneficial use of his property. To constitute a regulatory taking the challenged actions must be such that they fail substantially to advance a legitimate state interest or deprive the owner of the economically viable use of his property. (*See, Seawall v. City of New York, supra*, 74 N.Y.2d at 107, 544 N.Y.S.2d 542, 542 N.E.2d 1059; *Nollan v. California Coastal Commn., supra*, 483 U.S. at 834, 107 S.Ct. at 3147; *Keystone Bituminous Coal Assn. v. DeBenedictis, supra*, 480 U.S. at 485, 107 S.Ct. at 1241.) The property owner who challenges government action as a regulatory taking "bears the heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of his claim beyond a reasonable doubt." (*de St. Aubin v. Flacke*, 68 N.Y.2d 66, 76, 505 N.Y.S.2d 859, 496 N.E.2d 879.) Plaintiffs have failed to meet this burden.

Plaintiffs' claim of a regulatory taking rests in part on the premise that the challenged regulations frustrate their reasonable investment-backed expectation of being able to evict their tenants. In making this argument, they rely on dicta in *Seawall* that "[t]he Supreme Court seems also to have adopted the view that a regulation which has the effect of substantially frustrating 'reasonable investment backed expectations' * * * constitutes a per se taking [citations omitted]." (74 N.Y.2d at 107 n. 6, 544 N.Y.S.2d 542, 542 N.E.2d 1059.) In fact, in *Lucas v. South Carolina Coastal Council*, —— U.S. ——, 112

S.Ct. 2886, 120 L.Ed.2d 798, the Supreme Court identified at least two categories of regulations that, without any inquiry into the public interest advanced in support of the restraint, would give rise to a taking per se—those effecting a "physical 'invasion' " of the owner's property and those denying the landowner "all economically beneficial or productive use of land." (*Id.* at ——, 112 S.Ct. at 2893.) While " '[t]he economic impact of the regulation on the claimant and * * * the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally" (*id.* at —— n. 8, 112 S.Ct. at 2895 n. 8, quoting, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631), neither constitutes a separate category of a per se regulatory taking. (*See, id.*) The public purpose and character of the government's action is another noncategorical consideration in regulatory takings analysis. (*Birnbaum v. State of New York*, 73 N.Y.2d 638, 645, 543 N.Y.S.2d 23, 541 N.E.2d 23, *cert den*, 494 U.S. 1078, 110 S.Ct. 1806, 108 L.Ed.2d 936; *see also, Rochester Gas & Elec. Corp. v. Public Serv. Comm.*, 71 N.Y.2d 313, 324, 525 N.Y.S.2d 809, 520 N.E.2d 528.)

In assessing these noncategorical factors, courts must engage in "essentially ad hoc, factual inquiries" in order to "determin[e] when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons" (*Penn Central Transp. Co. v. New York City, supra*, 438 U.S. at 124, 98 S.Ct. at 2659, *quoting Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130.) "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322).

Weighing these considerations, we are unable to find a regulatory taking. Any reasonable expectation plaintiffs had of evicting the two tenants in question must have been, realistically, a qualified one. As the IAS court aptly noted, plaintiffs purchased a premises knowing that it was subject to rent control, a system under which landlord tenant relationships are highly regulated and the continuing trend has been toward tenant protection. No one could reasonably expect that the regulatory scheme then in effect would remain fixed in all its permutations. For that reason, when an already extensively regulated sector of commercial life is subjected to further regulation of a similar kind, courts are reluctant to find that an investment backed expectation has been frustrated. (*See, Rochester Gas & Elec. v. Public Serv. Commn., supra,* 71 N.Y.2d at 324-25, 525 N.Y.S.2d 809, 520 N.E.2d 528.)

It should also be noted that any expectancy plaintiffs might have as to the recapture of the apartments for their own personal use was always contingent on their ability to demonstrate an immediate and compelling necessity for such use. (*See,* Administrative Code § 26-408[b][1]; 9 NYCRR § 2204.5[a].) Plaintiffs have failed to demonstrate that they would be able to make such a showing. Thus, any expectancy they might realisticaliy have had was a speculative one.

Nor have plaintiffs given any hint as to the economic impact of the regulations on their property. Without some factual showing as to the rental income and purchase price of the building, no court can even begin to make an assessment of the regulation's economic effect. Since it is plaintiffs' burden to show the regulation's unconstitutionality beyond a reasonable doubt (*Rochester Gas & Elec. v. Public Serv. Commn., supra,* 71 N.Y.2d at 319-320, 525 N.Y.S.2d 809, 520 N.E.2d 528), the failure to tender the requisite financial data renders their claim infirm.

Finally, the nature of the regulation is not of the type to constitute a regulatory taking. In assessing the character of the governmental action in the face of a taking claim, the essential inquiry is whether the action has "permanently appropriate[d]" the owner's assets. (*Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166.) The regulations at issue, as noted, do not create a perpetual tenancy but allow for termination of the tenancies affected by the occurrence of normal events.

Plaintiffs also argue that the challenged regulations effect a regulatory taking because they fail to serve a substantial governmental purpose. A regulation can effect a taking if it fails substantially to advance a legitimate state interest. (*Keystone Bituminous Coal Assn. v. DeBenedictis, supra,* 480 U.S. at 485, 107 S.Ct. at 1241, citing, *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. at 124, 98 S.Ct. at 2659; *Seawall Assocs. v. City of New York, supra,* 74 N.Y.2d at 107, 544 N.Y.S.2d 542, 542 N.E.2d 1059.) "[A] broad range of governmental purposes and regulations" will satisfy this [legitimate state] interest requirement. (*Nollan v. California Coastal Commn., supra,* 483 U.S. at 835, 107 S.Ct. at 3147.) As this court noted in *McMurray v. DHCR, supra,* 135 A.D.2d 235, 238, 524 N.Y.S.2d 693, "The protection afforded . . . long-term tenants of rent-controlled apartments is a tacit recognition of the devastating impact that evictions can have on such tenants and their communities. . . . [L]ong-term tenants, 'by virtue of their longevity, have become an integral part of their community and have not violated their obligations to the landlord . . . [and] should [therefore] be afforded protection from eviction since forcing them out of their housing accommodations after 20 years could have a devastating effect on them and their community' ". The argument that a tenant of 20 years would face no greater hardship from eviction than any other tenant ignores reality. After a long residency a tenant takes root in the

community and his or her forced removal from familiar surroundings causes, at the very least, severe disruption. It can also contribute to the problem of homelessness. Clearly, the residency status protected by the challenged regulation advances a legitimate state interest.

The argument that the challenged rent-control provision subjects plaintiffs to involuntary servitude is frivolous. (*See, Sobel v. Higgins, supra,* 188 A.D.2d at 287, 590 N.Y.S.2d 883.) Contrary to plaintiffs' claim, the amendment to the owner-occupancy rent-control provision protecting 20-year tenants from eviction does not compel them to remain a landlord against their will. As noted already, plaintiffs purchased this property knowing that it was occupied by rent controlled tenants and that its use was regulated. (*See, Marcus Brown Holding Co. v. Feldman,* 256 U.S. 170, 199, 41 S.Ct. 465, 466 65 L.Ed. 877.) Plaintiffs need only sell their building to escape the minimal restrictions placed on them by the challenged provisions. Plaintiffs' due process claims are equally frivolous. A rent-control provision such as those at issue are well within the government's police powers. They bear "a reasonable relationship to the valid public purpose of preserving affordable housing and preventing the dislocation of lower income and moderate income tenants [citations omitted]." (*Sobel v. Higgins, supra,* 188 A.D.2d at 288, 590 N.Y.S.2d 883.)

Accordingly, the judgment of the Supreme Court, New York County (Phyllis Gangel-Jacob, J.), entered July 10, 1992, which, *inter alia,* declared Administrative Code § 26-408(b)(1) and 9 NYCRR § 2204.5(a) to be constitutional, should be affirmed, without costs or disbursements.

Judgment, Supreme Court, New York County (Phyllis Gangel-Jacob, J.), entered July 10, 1992, unanimously affirmed, without costs.

All concur.

Order filed.

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
IAS 34

Index No. 14558/91

JOAN DAWSON, PAUL DAWSON and TANDRA DAWSON,
Plaintiffs,

- against -

RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal, and FELICE MICHETTI, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Defendants.

PHYLLIS GANGEL-JACOB, J.:

More or less continuously since the early 1940's the City of New York has had in place one or more plans of rent control which have affected, at one time or the other, much of its rental housing stock. As New Yorkers know, the present regulatory programs—the older Rent Control law whose applicability is diminishing over time and the newer and now more extensively applied regulation effected through the Rent Stabilization law, both as now amended and extended—cover hundreds of thousands of units. This case, however, involves only a five story, 23 foot wide brownstone located in Central Harlem.

The plaintiffs are the owner of the building and her children, each of whom now occupies a different part of the building. They are Joan Dawson, who bought the building and moved into a unit located in it in 1983, and her adult children, Paul Dawson and Tandra Dawson,

each of whom now occupies a separate floor in the building. When the building was purchased it contained units subject to rent control; and the complaint alleges that there are still in occupancy two unrelated (and unnamed and unjoined) tenants each of whom has a rent controlled unit which each has occupied for more than 20 years.

The plaintiffs do not question that the tenants would be entitled to the protective benefits set out in Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the City's Rent Control Regulations *if* the parts of the sections which grant those benefits are constitutional; and so they eschewed seeking any relief through the administrative channels of the New York State Division of Housing and Community Renewal (D.H.C.R.) and seek instead a judgment which declares that those sections, on their face, violate various provisions of the Federal and State constitutions. After some stipulations to substitutions, the parties defendant are the Commissioner of the D.H.C.R. and the City of New York. All the parties have cross-moved for summary judgment.

The rent control law and regulations limit the amount of rent which may be charged for the premises and further regulate the relationship between the owner and the controlled tenant by creating a statutory tenancy which can only be terminated for non-payment, unless the owner has secured a certificate of eviction from the D.H.C.R.. The D.H.C.R. may grant a certificate of eviction only pursuant to statute, after a hearing where affected tenants have an opportunity to participate and subject to administrative appeal and ultimate court review by Article 78 proceedings.

The plaintiffs allege they would have proceeded to seek a certificate of eviction for each of the two tenant occupied units in the building under the general provisions of Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the City's Rent Control Regula-

tions. Those sections generally direct that a certificate of eviction can be issued

> "where the landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy, or for the personal use and occupancy of his immediate family . . . ."

The plaintiffs' problem is this: In 1984 these sections were amended to provide that certificates of evictions would not be issued on the landlord's claim of necessity for personal use and occupancy, where the tenants whose eviction was sought on that ground "has been a tenant in a housing accommodation in that building for 20 years or more." The sections also bar certificates of eviction where the tenant is 62 years of age or older or suffers certain impairments which prevent the tenant from engaging in substantial gainful employment.

Plaintiffs' verified complaint alleges four causes of action. The first claims that the two sections constitute a physical taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 6 and 7 of the NYS Constitution since they fail to provide compensation to an owner when absolutely depriving him or her of the right of possession. The declaration sought is that the challenged provisions on their face constitute an unconstitutional physical taking of private property without just compensation and are void.

The second cause of action alleges that the challenged sections force plaintiffs to continue in the rental business against their will and to privately bear a social burden which should be borne by the public as a whole; that no legitimate state interest is being advanced and consequently there is a regulatory taking of private property without just compensation in violation of the Fifth Amendment to the U.S. Constitution and Article I section

7 of the NYS Constitution. The declaration sought is that the statute and regulation constitute an unconstitutional regulatory taking of private property without just compensaion and on their face are void.

The third cause of action alleges that the absolute prohibition against the eviction of long term tenants for owner occupancy reasons compels an owner to remain in the rental business against his or her will and thus constitutes a violation of the involuntary servitude clause of the Thirteenth Amendment to the U. S. Constitution and as such the statute and the regulation should be declared null and void on their face as resulting in involuntary servitude in violation of the Thirteenth Amendment.

The fourth cause of action alleges that these compulsory rental provisions deprive plaintiffs of their liberty and property due process rights, under the Fourteenth Amendment to the U. S. Constitution and Art. I Section 6 of the N.Y.S. Constitution, warranting a declaration that the contested provisions are null and void. All causes of action allege that there exists a justicable controversy.

In their answer Commissioner Higgins (now Aponte) and DHCR set forth four affirmative defenses including failure to state a cause of action; failure to exhaust administrative remedies; lack of jurisdiction by the court because the cause of action is not ripe for adjudication; and that the Commissioner acted pursuant to statutory authority in accordance with lawful procedure which was not arbitrary or capricious. The City of New York adopted the answer of defendant Michetti which, *inter alia*, denies the material allegations of the complaint.

The record in this case is obviously skimpy, and the issues are presented in extremely abstract and stark terms. It seems clear that plaintiffs have attempted to structure their attack so as to come within the reasoning of *Seawall Associates v. City of New York*, 74 N.Y.2d 92,

cert. den. sub nom. Wilkerson v. Seawall Associates, 493 U.S. 976 (1989) and the authorities cited therein. After carefully re-reading the *Seawall* opinion and the other authorities cited, I conclude against the plaintiffs.

I have carefully considered all of the plaintiffs' claims. Nothing that the plaintiffs allege rises to a violation of the 13th Amendment. That great clause which confirmed the abolition of slavery as it had existed in some of the United States, and has since stood as a bulwark against personal servitude or peonage is not at all involved in the present case. This case involves only property relations; and even if these tenant protections should be characterized as resulting in the uncompensated seizure of the plaintiffs' property, there is nothing about the way those protections operate that results in legally enforceable personal servitude for the plaintiffs or detracts from their personal status, dignity and freedom. Nothing in *Seawall* suggests the contrary. See also *Recknagel v. Baumgartner,* 17 N.Y.2d 345, 271 N.Y.S.2d 195 (1949); *Sobel v. Higgins,* 573 N.Y.S.2d 1000 (Supreme Court, NY County, 1991), *app. trans. to the App. Div.,* 79 N.Y.2d 822, 580 N.Y.S.2d 192 (1991).

The distinctions between the SRO moratorium and rent-up statute complained of in *Seawall* and the provisions protecting existing tenants brought under attack in the present case are decisive; they underline the constitutionality of the 20 year tenant protections brought into question here as against this facial attack. A similar facial attack on related certificate of evictions provisions in the Rent Control law on the ground that such provisions unconstitutionally prohibited the plaintiff in that case from going out of the rental business was dismissed *Sobel v. Higgins,* 573 N.Y.S.2d 1000 (Supreme Court, NY County, 1991), *app. trans. to the App. Div.,* 79 N.Y.2d 822, 580 N.Y.S.2d 192 (1991).

In this case the tenant protections are predicated on the pre-existing nexus between the owners and the tenants

and do not involve, as did the *Seawall* case the obligation to rent up vacancies. That is an important distinction, as Judge Hancock indicated in the writing for the majority in *Seawall.*

> "As we have already discussed, government has considerable latitude in regulating landlord-tenant relationships to *preclude eviction in hardship, emergency and rent-control cases*, and both this court and the Supreme Court [of the United States] have upheld such efforts . . . ." (Emphasis added.)

Judge Hancock was here referring to language earlier in his opinion, where he said that

> "rent-control and other land-lord-tenant regulations . . . involved restrictions imposed on *existing* tenancies where the landlords had *voluntarily* put their properties to use for residential housing." (Emphasis added.)

It is this same distinction which makes it clear that *Loretto v. Manhattan CATV Corp.*, 458 U.S. 419 (1982) is not applicable. These long term tenants were not quartered upon the plaintiffs, as plaintiffs suggest. The tenants were in possession for more than a decade before the plaintiffs came on the scene; and the plaintiffs knowingly bought into the highly regulated business of being an landowner. The rights and protections afforded these tenants existed in 1983 when plaintiffs acquired the building. If plaintiffs believed in 1983 that the existence of these statutory tenancies reduced the attractiveness of the investment, they presumably could take comfort that such reduced attractiveness lowered the purchase price. The very recent Supreme Court decision in *Yell v. Escondido,* —— U.S. ——, 112 S.Ct. 1522 (April 1, 1992) is in point; it holds that an indefinite tenancy created incident to a mobile home pad regulation, even where an interest is transferable by the tenant, does not amount to a physical taking under Loretto.

The last question is whether this protection for tenants of 20 years or more against removal to meet a landloard's desires for personal use amounts to an impermissible over-regulation or "regulatory taking". *Seawall* suggests a two-prong test looking, first, to the impact of the regulations on the landloard's property rights and, second to the public purpose served by the regulation. I believe the long-term tenant protections accorded by the 1984 amendments easily pass muster on each prong of this test.

First, the regulatory burden simply regulates the terms under which tenants can be evicted in accordance with the public interest. The law says that the plaintiffs cannot involuntarily evict the protected tenants, in order to liquidate the owner-tenant relationship the plaintiffs voluntarily bought into. Short of involuntary eviction or harassment, they are free to make any arrangement acceptable to these tenants or to await the turn of events which may result in these tenants' leaving without the plaintiffs intervention.

Second, there is no issue in this case of the amount of the rental reserved or whether it is being timely paid. Such questions cannot be raised in these proceedings, and one can presume that, if that were the nub of the issue, the plaintiffs would have proceeded along the administrative path and resort to Article 78 rather than making this unusual facial attack.

Finally, this tenant protective provision effectively aims at a justified over-all public purpose of providing adequate housing. The legislative jacket which comments on this protective legislation sets for the legislative finding that stability of tenure is linked in this case with protection against the most serious kinds of unnecessary psychological and social hardship. The habits which contribute to the effective use of housing accommodations (and so to their habitability) are especially difficult to acquire anew for all three of the clases protected by this legislation. Elderly and handicapped persons encounter these difficul-

ties in a way that is obvious to all, and which one can observe most dramatically in the displaced elderly and mentally disturbed victims of homelessness. The presence of such dislocated persons on our streets should have taught the City the value of the SRO housing it allowed to disappear. The tenant protective provision here in question goes to the heart of preserving to the extent possible those same values of stability when they have taken on the deep lineaments of familiarity through more than two decades of innocent use.

Recent scholarly opinion has begun to develop the argument that rent control/stabilization is fundamentally aimed at preserving stability of tenure. Price regulation, on this point of view, is a means of assuring such stability and preventing dislocation. See Curtis J. Berger, *Home is Where the Heart Is: A Brief Reply to Professor Epstein*, 54 BROOKLYN LAW REVIEW 1239; M.J. Radin, *Residential Rent Control*, 15 PHIL & PUBLIC AFFAIRS 350 (1986).

The legislature is well within its purview in balancing humaneness, avoidance of dislocation and protection of the weaker party to the landowner—tenant transaction against the maximum possible return on property or even the personal choice of the owner to use that particular property. There may be much to be said about the judgment resulting from the balance of these factors which is embodied in the provision attacked, but that discussion is a discussion about legislative policies and not a legal discussion about a taking of the plaintiffs' property.

The protections accorded to existing tenancies by this legislation are not affected by the fact that the two tenancies in question are characterized in the plaintiffs' complaint as single-room occupany (SRO) units. The mere fact that *Seawall* involved an attempt by the City to deal with the SRO problems which were ultimately held to have gone over the line and therefore an impermissible taking of property, in no way detracts from the

justifiable exertion of legislative power at issue which protects SRO's as well as other tenancies.

Nor is *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. den'd*, 485 U.S. 940, in point. First the authority of that case has now been reduced by the recent Supreme Court decision in *Yee v. Escondido*, —— U.S. ——, 112 S. Ct. 1522 (April 1, 1992) where the Supreme Court has held that a compelled tenancy, even where transferable, does not amount to a physical taking and where it also held that the "regulatory taking" question was not adequately raised. *Azul Pacifico, Incorporated v. City of Los Angeles*, 948 F.2d 575 (9th Cir., 1991) does deal with the regulatory taking point. It concludes that in cases where the monetary value of the unit is seen as transferred to the tenant because the tenant is permitted to sell the space in question and capture a rental premium which the court found to exist, there is a regulatory taking. There is no way to know if such a market rental premium exists in this case, and in any event the rights accorded to the protected tenants cannot legally be transferred by them, but must ultimately be surrendered to the owner. Nor do we know what the Supreme Court will do with the *Azul Pacifico* decision.

The challenged provisions substantially advance legitimate state interests (*Seawall, supra; Keystone, supra*), and were enacted and promulgated as "a tacit recognition of the devastating impact that evictions can have on such [long-term] tenants and their communities." As the New York Assembly memorandum in support of the legislation explained: 'In the present housing market, renting a new apartment can be financially devastating to a person on a retirement or limited income yet these people are often singled out by landlords for eviction because they often have been in the apartemnt for many years and thus pay lower rents.' (1984 NY Legis Ann, at 109.)" (*Matter of McMurray v. NYS DHCR, supra*, at 238). I find plaintiffs' other arguments that the challenged provisions do not advance legitimate state interests because they are

either superfluous, vague or too broad, to be entirely without merit (*see, Matter of McMurray v. NYS DHCR, supra*; *Sourian v. DHCR, supra*; *Lopez v. Mirabel*, 127 AD2d 771; *cf., Rent Stabilization Assoc. of N.Y., Inc. v. Higgins, supra*). Inasmuch as I find that there has not been any physical taking of plaintiffs' property, and the challenged provisions substantially advance legitimate state interests, I find that there has been no violation of plaintiffs' due process rights.

Accordingly, after review of all the authorities and papers, I find as a matter of law that on each of their causes of action plaintiffs have failed to state a claim upon which relief may be granted, their complaint is dismissed and their motion for summary judgment is denied. Defendants' cross-motion for summary judgment is granted to the extent of dismissing plaintiffs' complaint for failure to state a claim and to the extent that this court declares the NYC Rent Control Law, Administrative Code of the City of New York section 26-408(b)(1), and DHCR Rent Control Regulations, 9 NYCRR Section 2204.5(a) constitutional under both the Federal and State Constitutions, and not violative of any of plaintiffs' rights herein brought in issue.

This constitutes the decision and judgement of the court.

/s/ P.G.J.
A.J.S.C.

Dated: 6/23/92

[Filed Jun. 30, 1992]

[Judgment Entered 7/10/92]

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of October A.D. 1992.

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 1121 SSD 93

JOAN DAWSON, *et al.*,
Appellants,

v.

RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal, *et al.*,
Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is transferred without costs, by the Court *sua sponte*, to the Appellate Division, First Department, upon the ground that a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved (NY Const, art VI, §§ 3[b][2],5 [b]; CPLR 5601[b][2]).

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

STATUTORY PROVISIONS

RENT AND EVICTION REGULATIONS OF THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL

SUBCHAPTER 0—NEW Y0RK CITY RENT AND EVICTION REGULATIONS

[65 McKinney Unconsolidated Laws 1987]

§ 2204.5. Occupancy by landlord or immediate family

(a) A certificate shall be issued where the landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy, or for the use and occupany of his immediate family; provided, however, that this section shall not apply where a member of the household lawfully occupying the housing accommodation is 62 years of age or older, has been a tenant in a housing accommodation in that building for 20 years or more, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment. As used in this subdivision, the term "immediate family" includes only a son, daughter, grandson, granddaughter, stepson, stepdaughter, father, mother, father-in-law, mother-in-law, grandfather, grandmother, stepfather or stepmother.

ADMINISTRATIVE CODE OF NEW YORK CITY
TITLE 26, CHAPTER 3

[65 McKinney Unconsolidated Laws 1987]

§ 26-408. Evictions

a. No tenant, so long as he or she continues to pay the rent to which the landlord is entitled, shall be removed from any housing accommodation which is subject to rent control under this chapter [1] by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated, notwithstanding any contract, lease agreement, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto, except on one or more of the following grounds, or unless the landlord has obtained a certificate of eviction pursuant to subdivision b of this section:

(1) The tenant is violating a substantial obligation of his or her tenancy other than the obligation to surrender possession of such housing accommodation and has failed to cure such violation after written notice by the landlord that the violation cease within ten days, or within the three month period immediately prior to the commencement of the proceeding the tenant has wilfully violated such an obligation inflicting serious and substantial injury to the landlord; or

(2) The tenant is committing or permitting a nuisance in such housing accommodation; or is maliciously or by reason of gross negligence substantially damaging the housing accommodation; or his or her conduct is such as to interfere substantially with the comfort and safety of the landlord or of other tenants or occupants of the same or other adjacent building or structure; or

(3) Occupancy of the housing accommodation by the tenant is illegal because of the requirements of law, and the landlord is subject to civil or criminal penalties therefor, or both, provided, however, that such occupancy shall not be considered illegal by reason of violations placed against the housing accommodations or the building in which same are located by any department or agency of the city having jurisdiction unless such department or agency has issued an order requiring the tenants to vacate said accommodation or building or unless such occupancy for such building or such violations relied on by the landlord result from an act, omission or situation caused or created by the tenant; or

(4) The tenant is using or permitting such housing accommodation to be used for an immoral or illegal purpurpose; or

(5) The tenant who had a written lease or other written rental agreement which terminated or shall terminate on or after May first, nineteen hundred fifty, has refused upon demand of the landlord to execute a written extension or renewal thereof for a further term of like duration not in excess of one year but otherwise on the same terms and conditions as the previous lease except in so far as such terms and conditions are inconsistent with this chapter; or

(6) The tenant has unreasonably refused the landlord access to the housing accommodation for the purpose of making necessary repairs or improvements required by law or for the purpose of inspection or of showing the accommodation to a prospective purchaser, mortgagee or prospective mortgagee, or other person having a legitimate interest therein; provided, however, that in the latter event such refusal shall not be ground for removal or eviction if such inspection or showing of the accommodation is contrary to the provisions of the tenant's lease or other rental agreement.

(7) The eviction is sought by the owner of a dwelling unit or the shares allocated thereto where such dwelling unit is located in a structure owned as a cooperative or as a condominium and an offering prospectus for the conversion of such structure pursuant to an eviction plan shall have been submitted to the attorney general pursuant to section three hundred fifty-two-eeee of the general business law and accepted for filing by the attorney general, and been declared effective in accordance with such law, and any right of continued occupancy granted by such law to a non-purchasing tenant in occupancy of such dwelling unit shall have expired; provided that the owner of the dwelling unit or the shares allocated thereto seeks in good faith to recover possession of a dwelling unit for his or her own personal use and occupancy or for the use and occupancy of his or her immediate family.

b. No tenant shall be removed or evicted on grounds other than those stated in subdivision a of this section unless on application of the landlord the city rent agency shall issue an order granting a certificate of eviction in accordance with its rules and regulations designed to effectuate the purposes of this title, permitting the landlord to pursue his or her remedies at law. The city rent agency shall issue such an order whenever it finds that:

(1) The landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his or her own personal use and occupancy or for the use and occupancy of his or her immediate family provided, however, that this subdivision shall not apply where a member of the household lawfully occupying the housing accommodation is sixty-two years of age or older, has been a tenant in a housing accommodation in that building for twenty years or more, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are ex-

pected to be permanent and which prevent the tenant from engaging in any substantial gainful employment; or

(2) The landlord seeks in good faith to recover possession of a housing accommodation for which the tenant's lease or other rental agreement has expired or otherwise terminated, and at the time of termination the occupants of the housing accommodation are subtenants or other persons who occupied under a rental agreement with the tenant, and no part of the accommodation is used by the tenant as his or her dwelling; or

(3) The landlord seeks in good faith to recover possession of a housing accommodation for the immediate purpose of substantially altering or remodeling it, provided that the landlord shall have secured such approval therefor as is required by law and the city rent agency determines that the issuance of the order granting the certificate of eviction is not inconsistent with the purpose of this chapter; or

(4) The landlord seeks in good faith to recover possession of housing accommodations for the immediate purpose of demolishing them, and the city rent agency determines that such demolition is to be effected for the purpose of constructing a new building, provided that:

(a) If the purpose of such demolition is to construct a new building containing housing accommodations, no certificate of eviction shall be granted under this paragraph unless such agency determines that such new building will contain at least twenty per centum more housing accommodations consisting of self-contained family units (as defined by regulations issued by such agency, with due regard for the shortage of housing accommodations suitable for family occupancy and for the purposes of this chapter in relation thereto) than are contained in the structure to be demolished; except, however, that where as a result of conditions detrimental to life or health of the tenants, violations have been placed upon the structure containing the housing accommodations by any

agency of the city having jurisdiction over such matters and the cost of removing such violations would be substantially equal to or would exceed the assessed valuation of the structure, the new building shall only be required to make provision for greater number of housing accommodations consisting of self-contained family units (as so defined by regulation) than are contained in the structure to be demolished; and

(b) The city rent agency shall, by regulation, as a condidtion to the granting of certificates of eviction under this paragraph, require the relocation of the tenants in other suitable accommodations, provided that the city rent agency may, by regulation, authorize the the granting of such certificates as to any tenants or classes of tenants without such requirement of relocation, where such exemption will not result in hardship to such tenants or classes of tenants and will not be inconsistent with the purposes of this chapter; and

(c) The city rent agency may, by regulation, in order to carry out the purposes of this chapter, impose additional conditions to the granting of certificates of eviction under this paragraph, including, but not limited to, the payment of stipends to the tenants by the landlord in such amounts and subject to such variations and classifications as such agency may determine to be reasonably necessary; and

(d) No certificate of eviction shall be issued pursuant to this paragraph unless the landlord shall have secured such approval as is required by law for the construction sought to be effected, and the city rent agency determines that the issuance of such certificate is not inconsistent with the purpose of this chapter.

(5) Notwithstanding any provisions to the contrary contained in this subdivision or in subdivision d of section 26-410 of this chapter or in the local emergency housing rent control act [2]:

(a) no application for a certificate of eviction under paragraph three or four of this subdivision and no application for a certificate of eviction under paragraph one of subdivision j or under subdivision c of this section for the purpose of withdrawing a housing accommodation from the housing market on the grounds that the continued operation of such housing accommodation would impose undue hardship upon the landlord, pending or made on or after the effective date hereof shall be granted by the city agency unless the city rent agency finds that there is no reasonable possibility that the landlord can make a net annual return of eight and one-half per centum of the assessed value of the subject property without recourse to the remedy provided in said paragraph three or four or said subdivsion c or j and finds that neither the landlord nor his or her immediate predecessor in interest has intentionally or willfully managed the property to impair the landlord's ability to earn such return; and

(b) the effectiveness of any certificate of eviction or of any order granting a certificate of eviction pursuant to paragraphs three and four of this subdivision shall be suspended, and no tenant may be evicted pursuant to any such certificate or order, unless the city rent agency:

(i) finds that there is no reasonable possibility that the landlord can make a net annual return of eight and one-half per centum of the assessed value of the subject property without recourse to the remedy provided in said paragraphs three and four and finds that neither the landlord nor his or her immediate predecessor in interest has intentionally or willfully managed the property to impair the landlord's ability to earn such return; and

(ii) issues an order reinstating the effectiveness of any certificate of eviction suspended pursuant to this paragraph. The pendency of any judicial proceeding or appeal shall in no way prevent the taking effect of the relief granted in this subparagraph.

* * * *

j. (1) Nothing in this chapter shall be construed to require any person to offer any housing accommodations for rent, but housing accommodations already on the rental market may be withdrawn only after prior written approval of the city rent agency, if such withdrawal requires that a tenant be evicted from such accommodations.

STATE OF NEW YORK
COURT OF APPEALS

[SEAL]

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

May 19, 1994

Sam Kazman
1001 Connecticut Avenue
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Washington, D.C. 20036

Ronald D. Hariri & Associates, P.C.
805 Third Avenue, 21st Floor
New York, New York 10022

Re: Dawson v. Higgins and City of New York

Dear Counsel:

The Court has received your 500.2 jurisdictional statement and may examine its subject matter jurisdiction *sua sponte* with respect to whether a substantial constitutional question is directly involved to support an appeal as of right.

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to a dismissal of the appeal and transmit that paper to my office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persevere in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction, including references to the record demonstrating that a con-

stitutional question was raised in the court or other forum of original instance. Also please enclose a copy of each brief filed in the Appellate Division, as well as a copy of the Record on Appeal or Appendix filed in that court. Your adversaries are likewise afforded the opportunity to comment in writing on the subject matter jurisdiction.

If this *sua sponte* inquiry is terminated by the Court, the Clerk will notify counsel in writing and set a new schedule for normal perfecting of the appeal.

Very truly yours,

/s/ Stuart M. Cohen
STUART M. COHEN
Deputy Clerk

mec

cc: Hon. G. Oliver Koppell
Hon. Paul A. Crotty

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May 27, 1994

By Federal Express

Hon. Stuart M. Cohen
Deputy Clerk
State of New York Court of Appeals
Albany, New York 10022

Re: Dawson v. Higgins; N.Y. Cty Index No. 14558/91

Honorable Sir:

As counsel with Sam Kazman to plaintiffs-appellants in the above matter, we respond to the Court's jurisdictional inquiry. As detailed below, the case raises important constitutional issues that merit the Court's attention.

This case challenges, on constitutional grounds, the application of New York State's ban on owner-occupancy evictions to a landlord who purchased her Harlem brownstone *before* the enactment of the law at issue.

As a preliminary note, counsel wishes to inform the Court of a new development which came to our attention on May 25. In April and May of 1994, Joan Dawson's two tenants permanently left her house as a result of her buy-out of their tenancies. As explained below,

this in no way affects the Dawsons' claims in this case. *See* footnote 3, below.

* * * *

---

[3] The fact that the Dawsons' tenants have finally left does not alter the Dawsons' claim that their property rights were violated. "[W]here the government's activities have already worked a taking of all use of property, no subsequent action . . . can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2389 (1987). The Appellate Division ruling that the Dawsons suffered no taking of property forecloses any further attempt by them to seek constitutional compensation. That ruling thus still merits review by this Court, no less than it did when the tenants were still in the Dawsons' house.

No. 94-624

Supreme Court, U.S.
F I L E D
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOAN DAWSON, PAUL DAWSON and TANDRA DAWSON,

Petitioners,

—against—

DONALD M. HALPERIN, Commissioner of the New York State Division of Housing and Community Renewal, and THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENT DONALD M. HALPERIN'S BRIEF IN OPPOSITION

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Questions Presented

1. Did the New York State Court of Appeals properly dismiss petitioners' appeal on the ground that the issues presented have become moot.

2. Do the New York rent control provisions which protect a tenant who has resided in an apartment for twenty years or longer from eviction by a landlord seeking possession of the apartment for his personal use violate any right guaranteed petitioners under the Fifth, Thirteenth or Fourteenth Amendments to the Constitution of the United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-624

JOAN DAWSON, PAUL DAWSON and TANDRA DAWSON,

Petitioners,

—against—

DONALD M. HALPERIN, Commissioner of the New York State Division of Housing and Community Renewal, and THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENT DONALD M. HALPERIN'S BRIEF IN OPPOSITION

Introduction

Respondent Donald M. Halperin respectfully submits that the petition for a writ of certiorari should be denied in this challenge to New York State regulations which protect tenants who have resided in a rent-controlled apartment for twenty years or longer from eviction. The issues in this proceeding have, as the New York Court of Appeals held, become moot. Moreover, the decision of the Appellate Division upholding

the regulations is not in conflict with decisions of this Court or at odds with holdings in any other jurisdiction.

Statement Of The Case

A. New York's Protection Of Tenants Who Have Resided In Rent-Controlled Apartments For Twenty Years Or Longer

In order to evict a tenant from a rent-controlled apartment, a landlord, in most instances, must first obtain a certificate of no objection to eviction issued by the New York State Division of Housing and Community Renewal ("DHCR"). 9 NYCRR § 2204.2.

Under Section 26-408(b)(1) of the New York City Rent Control Law and Section 2204.5(a) of the City's Rent Control Regulations, a certificate of eviction may be issued "where the landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own person use and occupancy, or for the personal use and occupancy of his immediate family. . ."

However, the rent control law and regulations prohibit the landlord from issuing such a certificate where the tenant is either disabled or over sixty-two years old, or has resided in the apartment for at least twenty years. § 26-408(b)(1), City Rent Control Law; 9 NYCRR § 2204.5(a).

The purpose of this prohibition has been stated as follows:

> Allowing landlords to evict senior citizens and disabled persons could result in financial and physical hardship. These individuals tend to be less mobile, of failing health, and have limited or fixed incomes. Areas with rent regulation have opted to have such regulations as a result of a declared housing shortage. These factors make it extremely difficult for these tenants to find safe, decent and affordable housing elsewhere.

> Similarly, long-term tenants of two decades are often elderly, although not 62 years of age, and have limited incomes. These tenants, by virtue of their longevity, have become an integral part of their community and have not violated their obligations to the landlord. In view of this, these individuals should be afforded protection from eviction since forcing them out of their housing accommodations after 20 years could have a devastating effect on them and their community.

Bill Jacket, 1984 Laws of New York, c. 234 at 8.

Despite the fact that a tenant who has resided in the same apartment for twenty years or longer may otherwise qualify for protection under these provisions, the landlord may nevertheless seek the tenant's eviction and recover possession for his own use where (1) the tenant is violating a substantial obligation of the tenancy, committing or permitting a nuisance, damaging the premises, substantially interfering with the comfort or safety of the landlord or other tenants, refusing the landlord access to make repairs, or refusing to execute a renewal lease; (2) a subtenant of the tenant is in occupancy after the expiration of any lease; (3) subject to certain conditions, possession is sought for the purpose of demolishing or substantially altering the premises; and (4) the landlord wishes to withdraw the premises from the market on the ground that its continued operation would impose undue hardship upon the landlord, and the rent regulatory authority finds that there is no reasonable possibility that the landlord can make a net annual return of 8 1/2% of the assessed value of the subject property and the landlord and the landlord's immediate predecessor have not intentionally or wilfully managed the property to impair the ability to earn such a return. N.Y.C. Admin. Code § 26-408; 9 NYCRR § 2204.

B. Prior Proceedings

In August, 1990, petitioners commenced this declaratory judgment action by filing a verified complaint in the Supreme Court of the State of New York challenging the constitutionality of the bar to the eviction of twenty-year tenants.

Petitioners had purchased a five-story brownstone in New York City in November, 1983. They knew, at the time, that the building contained at least two rent-controlled tenants who had lived in the building since 1970. (A. 3a).[1] In 1990, petitioners wished to evict these tenants in order to obtain the units for their own use and occupancy but believed they were prevented from doing so by reason of the protections afforded twenty-year residents by the challenged provisions. In their lawsuit, petitioners alleged that the enforcement of the provisions subjected them to a compelled tenancy, constituting a physical and regulatory taking of property and a violation of due process and the prohibition against involuntary servitude. (A. 18a-19a).

Following cross-motions for summary judgment, State Supreme Court dismissed the complaint in its entirety for failure to state a cause of action and upheld the constitutionality of the challenged provisions. (A. 16a-25a).

In April, 1994 the Appellate Division, First Department, unanimously affirmed the lower court's ruling. 197 A.D.2d 127 (1st Dep't 1994). (A. 2a-15a).[2] In its decision, the Appellate Division rejected petitioners' claim that the New York Court of Appeals' ruling in *Seawall Assoc. v. City of New*

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[1] References preceded by "A" are to pages of the appendix to the petition.

[2] After the entry of judgment, petitioners sought a direct appeal as of right to the New York State Court of Appeals pursuant to CPLR § 5601(b)(2). By order entered October 29, 1992, the Court of Appeals transferred the appeal to the Appellate Division, First Department "upon the grounds that a direct appeal does not lie when questions other than the validity of a statutory provision are involved." (A. 26a).

York, 74 N.Y.2d 92, *cert. denied*, 453 U.S. 976 (1989), and this Court's decision in *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992), required an invalidation of the challenged regulations. Rather, the court found that the tenant protections involved here are predicated on a pre-existing relationship between the owners and the tenants. Thus, the court concluded that no physical taking was effected since the restriction of the challenged regulations is imposed on existing tenancies where the landlords had already put their properties to use for residential housing. The court further concluded that the leases involved were not perpetual since there were numerous circumstances which might develop terminating the tenancy.

As to petitioners' claim of a regulatory taking, the court rejected the argument that the challenged regulations frustrated their reasonable investment-backed expectations. As the court pointed out, any reasonable expectations petitioners had of evicting the two tenants in question must have been a qualified one since they knowingly purchased a premises that was highly regulated. Further, the protection of long-term tenants was held to serve a legitimate government purpose.[3]

Additionally, the Appellate Division held that the regulations protecting twenty-year tenants from eviction do not compel petitioners to remain landlords against their will. In fact, the court found petitioners' claim of involuntary servitude, as well as their due process claim, "frivolous."

Petitioners' appeal to the Court of Appeals was thereafter dismissed as moot on July 7, 1994, after petitioners informed

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[3] In rejecting the petitioners' takings arguments, the court pointed out that an identical challenge to these same regulations had recently been rejected in a previous case. *Sobel v. Higgins*, 188 A.D.2d 286 (1st Dep't 1992), *appeal dismissed*, 81 N.Y.2d 953, *leave to appeal denied*, 82 N.Y.2d 655 (1993). *See also Sourian v. Higgins*, 170 A.D.2d 258 (1st Dep't 1991); *McMurray v. DHCR*, 135 A.D.2d 235 (1st Dep't), *aff'd*, 72 N.Y.2d 1022 (1988); *Lopez v. Mirabel*, 127 A.D.2d 771 (2d Dep't 1987); *Lavalle v. Scruggs-Leftwich*, 133 A.D.2d 313 (1st Dep't 1987).

the court that the two twenty-year tenants residing in the petitioners' building had vacated their respective apartments. (A. 1a).

REASONS FOR DENYING THE WRIT

I. The Issues Which Petitioners Raise In This Proceeding Have Been Rendered Moot By The Permanent Departure Of The Tenants From Their Apartments

The New York State Court of Appeals dismissed petitioners' appeal on the ground of mootness after being informed by petitioners' counsel that the two tenants in their building who had resided there for more than twenty years had permanently left the premises. Petitioners now argue that the proceeding is not moot, even though the tenants have vacated the premises, because they suffered damages during the period when they could have evicted the tenants but were barred by New York regulations from doing so. They maintain that the dismissal of their appeal deprived them of compensation for a temporary taking under *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987), which held

> that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

Id. at 321. Petitioners are mistaken.

In *First English*, the plaintiffs brought an inverse condemnation suit seeking damages for what they claimed was an uncompensated taking effected by restrictions which the County of Los Angeles had placed on the use of their property. They did not seek an injunction against the enforcement of the Los Angeles ordinance in question. This Court merely held that, should the plaintiffs prevail in establishing that the ordinance violated their constitutional rights, they would be

entitled to damages which they incurred during the temporary period when they were legally prevented from using their property as they wished.

Here, on the other hand, petitioners brought this declaratory judgment action solely to prohibit the State from implementing its regulations. They never suggested that they were seeking damages. Rather, they sought only to be able to evict their two tenants and use their property for their own personal enjoyment.

The fact that the tenants no longer reside in their building has rendered the case moot. Petitioners are now entitled to fully enjoy the use of their entire building. Their attempt to preserve this case by belatedly raising the possibility that they are entitled to damages for the period when the tenants remained in occupancy should be rejected.

II. The Challenged Provisions Do Not, In Any Event, Effect A Taking Of Petitioners' Property

Property interests are protected against governmental interference by two provisions of the United States Constitution: 1) the due process clause of the Fourteenth Amendment and 2) the taking without just compensation clause of the Fifth Amendment.[4]

Property rights under these constitutional provisions, however, are not absolute. Rather, such rights have long been subject to uncompensated restrictions through a state's exercise of its police power in prescribing regulations "to promote the health, peace, morals, education, and good order of the people." *Barbier v. Connolly*, 113 U.S. 27, 31-32 (1884). As this Court explained in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987), "under our system of government, one of the state's primary ways of preserving the

[4] The just compensation clause is applicable to the states through the Fourteenth Amendment. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897).

public weal is restricting the uses individuals can make of their property . . . . These restrictions are 'properly treated as part of the burden of common citizenship'." (citation omitted).

With respect to landlords and tenants, this Court has noted that the " 'states have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.' " *Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)). Similarly, in *Seawall Assoc. v. City of New York*, 74 N.Y.2d at 112 n.11, the New York Court of Appeals pointed out that "government has considerable latitude in regulating landlord tenant relationships to preclude eviction in hardship, emergency and rent-control cases."

Through the years, federal, state and local governments have, in response to significant housing shortages, enacted legislation declaring the existence of a serious public emergency and restricting the ability of landlords to raise rents and evict tenants. This Court and the New York Court of Appeals have consistently upheld these restrictions and rejected claims that such measures constitute an improper taking without just compensation.[5]

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[5] *See, e.g., Yee v. City of Escondido*, 112 S.Ct. at 1522 (rent control ordinance did not amount to a physical taking); *Pennell v. City of San Jose*, 485 U.S. at 1 (rent control ordinance not facially unconstitutional); *Bowles v. Willingham*, 321 U.S. 503 (1944) (upholding federal law which fixed maximum rents that could be charged in defense-rental areas); *Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d 156 (1993), *cert. denied*, 114 S.Ct. 2693 (1994) (right of family members to succeed to rent stabilized tenancy did not effect a taking of landlords' property); *Spring Realty Co. v. New York City Loft Board*, 69 N.Y.2d 657 (1986), *appeal dismissed*, 482 U.S. 911 (1987) (statute providing loft residents with status as rent-stabilized tenants did not constitute a "taking"); *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 996 (1980), *appeal dismissed*, 449 U.S. 1119 (1981) (rejecting claim that the continuation of the New York City Rent

Here, too, there has been no unconstitutional taking of a landlord's property. The challenged rent control provisions protect vulnerable persons from eviction where a landlord seeks their apartments for his own use and occupancy. Protecting such persons from eviction does not violate the petitioners' constitutional rights.

A. There Has Been No Physical Taking

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-435 (1982), this Court explained that where the character of governmental action is a permanent *physical* occupation—either by the government itself or by a third party authorized by the government to do so—a compensable taking will be found "to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Elaborating on this rule, the Court, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987), found that a physical occupation—*per se* compensable—has occurred where the government gives a stranger or a third party "a per-

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Control Law effects an unconstitutional taking); *Bucho Holding Co. v. Temporary State Housing Rent Comm'n*, 11 N.Y.2d 464 (1962) (finding that the provision of the Emergency Housing Rent Control Law which fixed the return to which a landlord is entitled was neither confiscatory nor unconstitutional on due process grounds); *I.L.F.Y. Co. v. Temporary State Housing Rent Comm'n*, 10 N.Y.2d 263, 268 (1961), *appeal dismissed*, 369 U.S. 795 (1962) (upholding rent control law and finding that "prohibitions against rent increases may in an emergency be constitutional although they reduce the value of the property regulated and deprive its owner of what otherwise would be considered a fair return"); *Teeval Co. v. Stern*, 301 N.Y. 346, 362 *cert. denied*, 340 U.S. 876 (1950) (holding that state rent control statute "does not contemplate a taking of the property of any landlord"); *Loab Estates, Inc. v. Druhe*, 300 N.Y. 176, 180 (1949) (upholding New York City law restricting the right of landlords to evict tenants and, in doing so, noting that "similar restrictions upon the power of a landlord" had previously been affirmed); *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429 (1921) (state rent control law upheld in face of claim that it constituted an improper taking without just compensation).

manent and continuous right" to pass and repass across private property. *See also Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

Applying this standard, the Appellate Division properly rejected petitioners' physical taking claim, holding no physical taking of the landlords' property existed since there was hardly a permanent physical occupation by a stranger or third party given that the tenants were already residing on the premises when it was purchased by the petitioners.

Petitioners nevertheless argue that this Court's decision in *Yee v. Escondido*, 112 S.Ct. at 1522 requires a contrary result. Petitioners are mistaken. *Yee* involved a physical taking challenge stemming from the interaction of a recently-enacted local rent control ordinance and the California Mobile Home Residency Law which provided that renters of mobile home "pads" could unilaterally transfer their tenancies to unrelated third parties. Park owners were no longer free to set rents or decide who their tenants would be, and pad renters could sell their mobile homes in place at a premium to any outsider of their choice. The premium was attributable to the corresponding right to occupy the pad on which the home stood at a below-market rent. This Court rejected the owners' claim, holding that where owners voluntarily place their property on the rental market, the government may limit rents and require that landlords accept tenants whom they might wish to exclude. 112 S.Ct. at 1529.

It is true, as petitioners point out, that the Court in *Yee* suggested that laws which compel a landowner to refrain *in perpetuity* from terminating a tenancy might produce a different legal result. 112 S.Ct. at 1529. However, the rent control provisions challenged here do not require a landlord to remain in the rental market in perpetuity. Rather, they apply only to specific tenants. As the Appellate Division noted,

> the occurrence of a number of events would allow the landlord to recover [a twenty-year] tenant's housing accommodation. For instance, the landlord might recover

> the unit upon the tenant's death or upon the tenant's violation of a substantial obligation of the tenancy, or in instances where the tenant is committing acts constituting a nuisance or permitting the same or permitting the accommodation to be used for immoral or illegal purposes; or upon the landlord's decision to demolish or substantially alter the premises or to withdraw the premises from the rental market where there is no reasonable possibility [of] realizing a net annual return of $8^1/_2\%$ of the property's assessed value. (*See*, New York City Administrative Code § 26-408; 9 NYCRR § 2204.) Plaintiffs have failed to make a showing that these contingencies cannot occur. . . .

(A. 9a-10a).

Since the owners here voluntarily purchased property already used for residential housing and were only temporarily limited from withdrawing two units from the rental market, their takings claim is not supported by *Yee*. Their argument is thus without merit.

B. There Has Been No Regulatory Taking

Governmental action affecting private property may constitute a taking even if it does not result in the physical invasion of such property. However, since government could hardly function if it had to pay for every action that adversely affects economic value, courts have never found a taking merely because a regulation prevents the most profitable or beneficial use of particular property. Rather, regulatory takings have been found only when challenged actions do not substantially advance legitimate state interests or deny owners economically viable use of their property. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. at 834; *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. at 485; *Seawall*, 74 N.Y.2d at 107. Petitioners have failed to make such a showing.

1. Economically Viable Use Of Property

To deprive an owner of the economically viable use of his land, a regulation must make it "impossible" or "commercially impracticable" for the owner to profitably engage in his business, or unduly interfere with the owner's reasonable "investment-backed expectations." *Keystone*, 480 U.S. at 485, 495-96; *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 127, 136 (1978).

New York's rent control law was first enacted forty-two years ago. Any subsequent purchaser of rent-controlled housing was on notice that he was investing in a heavily regulated market with significant constraints on profit, eviction and disposal of property. Petitioners, therefore, cannot reasonably complain that the provisions unfairly interfered with their use of their property.

In any event, as this Court noted in a recent takings decision, *Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California*, 113 S.Ct. 2264, 2291 (1993):

> . . . our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S. Ct. 114, 117, 71 L.Ed. 303 (1926) (approximately 75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (92.5% diminution).

See also Yee v. City of Escondido, 112 S.Ct. at 1529; *Dolan v. City of Tigard*, 114 S.Ct. 2309. Since petitioners have not demonstrated that they are suffering complete economic hardship,[6] they have failed to satisfy this prong of a regulatory takings claim.

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[6] Indeed, petitioners do not disagree and admit that they cannot demonstrate economic hardship. Pet. at 13 n.7.

2. Advancement Of Legitimate State Interests

The purposes served by the provisions—the control of rental costs and the preservation of affordable housing and moderate income neighborhoods—are valid governmental concerns. *See, e.g., Pennell v. City of San Jose*, 485 U.S. at 13 ("a legitimate and rational goal . . . is the protection of consumer welfare"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 440 ("The States have broad power to regulate housing conditions"); *Bowles v. Willingham*, 321 U.S. at 503 (upholding statute whose aim was "the effective protection of our price structure"); *Block v. Hirsch*, 256 U.S. 135 (1921) (approving rent control in Washington, D.C. on the basis of Congress' finding that housing in the city was "monopolized"). In *Pennell*, the Court identified the "preven[tion of] excessive and unreasonable rent increases," the "protection of consumer welfare" by limiting rents, and "reducing the costs of dislocation" as legitimate public purposes. 485 U.S. at 14 n.8.

The prevention of egregious evictions has long been considered a legitimate state interest, especially in the context of housing shortages. In fact, recent New York decisions have emphasized the proprietary of governmental action to reduce dislocation of residents from their apartments and communities. Thus, in *Braschi v. Stahl Assoc. Co.*, 74 N.Y.3d 201, 213 (1989), the Court of Appeals recognized one of the purposes of the rent control laws to be "the protection of individuals from sudden dislocation," (plurality opinion) or, as stated in the concurring opinion (Bellacosa, J.), "protection against one of the harshest decrees known to the law—eviction from one's home." *Id.* at 215; *see also Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d at 156 (1993) (family members residing in rent-controlled unit allowed to continue to do so upon named tenant's death).

Thus, the challenged provisions, which prevent the eviction of the most vulnerable members of the tenant population, sub-

stantially advance legitimate governmental purposes in a manner sufficient to survive constitutional scrutiny.[7]

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[7] Petitioners argue that the decision of the Appellate Division conflicts with the decisions of two other state courts. *See* Pet. at 16-17 (citing *Granat v. Keasler*, 663 P.2d 830 [Wash. 1983]; *Kennedy v. City of Seattle*, 617 P.2d 713 [Wash. 1980] and *Polednak v. Rent Control Board of Cambridge*, 494 N.E.2d 1025 [Mass. 1986]). These cases, however, do not provide any such conflict or "split". To be sure, in each case, the court struck down a law which placed restrictions on an owner's ability to take his property off the rental market and occupy it for his own enjoyment. Nevertheless, in none of these cases did the court even suggest that under reasonable circumstances, such as where the tenants are elderly or otherwise long-standing occupants, the government could not prevent the eviction of tenants by an owner seeking to occupy the premises. Rather, in each of the cases cited by petitioners, the law was struck down because of a unique factor which placed unreasonable limits on the owner. *See Granat*, 663 P.2d 830 (landlord prohibited from the intended use of the property, but not the tenant); *Kennedy*, 617 P.2d at 713 (landlord required to locate a nonexistent moorage for a houseboat owner in order to evict the owner and occupy the site himself); *Polednak*, 494 N.E.2d 1025 (retroactive application of ordinance prevented resident tenant who later purchased apartment to continue to occupy unit).

CONCLUSION

BY REASON OF THE FOREGOING, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Dated: New York, New York
November 9, 1994

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the New York Court of Appeals properly determined that the issues presented in this proceeding have become moot.

2. Whether petitioners have shown that the New York rent control provisions which protect a tenant who has resided in an apartment for more than twenty years from eviction by a landlord seeking possession of the apartment for his or her personal use violates any right of petitioners under the Fifth or Fourteenth Amendments to the Constitution of the United States.

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RESPONDENT CITY OF NEW YORK'S BRIEF IN OPPOSITION

INTRODUCTION

Petitioners challenge certain rent control provisions applicable within the City of New York which protect from eviction tenants who have resided in a rent-controlled apartment for twenty years or longer. It is the position of

the City of New York, respondent here and defendant in the courts below, that the issues raised by the petition do not merit review in that they have been rendered moot by petitioner Joan Dawson's purchase of the tenants' leasehold, and in any event because the petitioners have failed to show that the challenged regulations are in conflict with any decision of this Court or of any other court.

STATEMENT OF THE CASE

The respondent City of New York hereby adopts the Statement of the Case set out at pages two through six of the Brief in Opposition of Respondent Halperin.

REASONS FOR DENYING THE WRIT

As in more fully stated in the brief of respondent Halperin, the writ should be denied because the issues are moot, and further because petitioners have failed to show that the challenged regulations interfered with any constitutional right.

The issues are moot because the tenants, who were protected from eviction by the challenged regulations because they had resided in the premises for more than twenty years, have vacated the premises pursuant to a sale of their leaseholds to petitioner Joan Dawson, the owner of the building. Petitioner's argument that there was a temporary taking for which they should receive compensation, citing First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987), is unavailing. In their complaint and submissions on the cross motions for summary judgment, petitioners sought only a judicial declaration of the statutes' unconstitutionality; petitioners never sought damages. Indeed, even had petitioners succeeded in having the challenged regulations declared unconstitutional, they would still be required, as noted by the Appellate Division, to establish an immediate and compelling need for personal use of the property. App. to

Pet., p.13a; see 9 NYCRR § 2204.5(a) and New York City Administrative Code § 26-408 (b) (1) (respectively set out at App. to Pet., pp. 27a, 30a-31a). Under those circumstances a claim for damages would have been speculative and in fact was not sought by petitioners. Petitioners, who desired to ultimately evict the tenants, are now free to use their property unaffected by the challenged regulations. The issues raised by petitioners are moot.

In any event, petitioners have failed to show any constitutional violation. There has been no physical taking. This Court has set a "clear rule" for determining such claims. Yee v City of Escondido, - U.S. -, 112 S. Ct. 1522, 1526 (1992). There has been no permanent occupation of the property by the government or by a third party authorized by the government. Loretto v Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982); Nollan v California Coastal Comm., 483 U.S. 825,

832 (1987). The challenged regulations do not "require[ ] any physical invasion of petitioner's property." Yee, p. 1528. The tenants were on the property when petitioner Joan Dawson decided to purchase the property, and as the Appellate Division pointed out in its decision, there are numerous circumstances under which a landlord might recover the tenant's accommodation despite the challenged regulations. App. to Pet., pp. 9a-10a. Here there is nothing more than a regulation of the landlord tenant relationship and the use of the property, not a physical taking. Yee, pp. 1529, 1531. Petitioners' asserted "right to exclude outsiders" (Pet., p. 13) is nothing more than an unfettered right to evict pre-existing tenants; however, a limitation on the right to evict a present tenant is the essence of rent regulation, not a physical occupation.

Likewise, petitioners have failed to establish a regulatory taking. Petitioners have conceded that they

cannot show economic hardship. Pet., p. 13, n.7; Nollan v Calif. Coastal Comm., supra, 483 U.S. at 834; Keystone Bituminous Coal Assn. v DeBenedictis, 480 U.S. 470, 485 (1987). Petitioners' assertion that the regulations improperly frustrated their reasonable investment-backed expectation of evicting the tenants was properly rejected by the Appellate Division in light of the highly regulated nature of the rent control system. App. to Pet., p. 13a. Finally, petitioners' argument that the regulations do not substantially advance legitimate state interests in its protection of long-term tenants, particularly in light of their concession that the regulation does forward such an interest in protecting the elderly and disabled (Pet., p. 20), is no more than an invitation to the Court to act as a super-legislature and to second-guess the decisions of New York's legislators. The disruptive effect upon long-term tenants in particular and upon the community in general arising from

such evictions is a matter of public concern which may and did support legislative action. App. to Pet., pp. 14a - 15a; Resp. Halperin's Brief in Opp., pp. 2 - 3. For that reason also, petitioners' substantive due process claim was properly dismissed below as "frivolous." App. to. Pet., p. 15a.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
December 6, 1994

Respectfully submitted,

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No. 94-624

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOAN DAWSON, PAUL DAWSON and TANDRA DAWSON,
Petitioners,

v.

DONALD M. HALPERIN, Commissioner of the New York State Division of Housing and Community Renewal, and THE CITY OF NEW YORK,
Respondents.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. THE GROUNDLESSNESS OF THE STATE COURT'S DISMISSAL OF THIS CASE IS BEST ILLUSTRATED BY RESPONDENTS' ATTEMPT TO DEFEND IT, SINCE THEY FAIL TO OFFER EVEN A SINGLE AUTHORITY TO SUPPORT THEIR ARGUMENTS

In defending the New York State Court of Appeals' dismissal of this case, the approaches taken by the State and by New York City have one overriding feature in common—a total absence of supporting citations. The State argues that

> "petitioners brought this declaratory judgment action solely to prohibit the State from implementing its regulations. They never suggested that they were seeking damages. . . .
>
> ". . . Their attempt to preserve this case by belatedly raising the possibility that they are entitled to damages . . . should be rejected." State, Brief in Opposition (Opp.) at 7.

The City makes the same argument, claiming that "petitioners sought only a judicial declaration of the statutes' unconstitutionality; petitioners never sought damages." City Opp. 3.

One would expect arguments such as these, involving allegedly improper pleading, to be accompanied by a host of cited authorities on New York procedure. But in fact neither respondent cites so much as a single court decision, statute or court rule. The reason for this is clear—they have no support.

The Dawsons expressly sought a judicial declaration that they had suffered a "taking of [their] property . . . without just compensation", together with "such other and further relief as [the] court may deem just and proper." Verified Complaint (Aug. 29, 1990) at 14, 16, Reply Brief App. 2a, 3a. New York case law clearly demonstrates what common sense suggests—that a declaratory judgment in the Dawsons' favor would *in itself* open the door to their pursuing damages, either upon remand in their original action "as an incident to the primary relief" sought,[1] or in a subsequent action in the New York State Court of Claims.[2] This case thus continues to satisfy

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[1] *Burke v. Crosson*, 152 Misc.2d 158, 162, 575 N.Y.S.2d 624, 627 (Sup. Ct., Onan. Cty., 1991), *aff'd*, 191 A.D.2d 997, 595 N.Y.S.2d 272 (4th Dept. 1993).

[2] The latter route is illustrated by one of New York's major temporary takings cases, in which a six-month statutory delay in the issuance of a demolition permit was held to constitute a taking. *Keystone Associates v. Moerdler*, 19 N.Y.2d 78, 278 N.Y.S.2d 185

New York's essential criterion for such actions—namely, "that a declaratory judgment would be useful." *Corso v. Nasser*, 42 A.D.2d 822, 822, 345 N.Y.S.2d, 793, 793-94 (4th Dept. 1973). In short, the Dawsons are as much entitled to a declaratory judgment now as they were when their tenants were still in residence.

In light of *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987), and of New York's own case law on temporary takings,[3] the respondents' alleged surprise over the issue of damages demonstrates the depth of their obliviousness to takings jurisprudence. Like the police captain in *Casablanca*, who is "shocked, shocked" when informed of gambling in Rick's Cafe, the respondents are "shocked, shocked" at the prospect of liability if they are found to have engaged in a taking. They do protest too much.

II. RESPONDENTS' TREATMENT OF THE MERITS DEMONSTRATES THE NEED FOR A RULING FROM THIS COURT

Respondents' arguments on the merits fare no better. The State characterizes the Dawsons as having been "only temporarily limited from withdrawing two units from the rental market", and therefore supposedly beyond this Court's proscription of tenancies compelled "in perpetuity". State Opp. 11; *Yee v. City of Escondido*, 112 S. Ct. 1522, 1529 (1992). But the fact that the Dawsons succeeded in *paying* their tenants to leave does not change the permanent nature of the legal compulsion imposed on them. One can scarcely conceive of a compulsory tenancy that could not be ended by a sufficiently large cash payment. That the Dawsons finally decided to pay this "ex-

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(1966). The declaratory judgment issued in that case enabled the property owners to subsequently seek and, fourteen years later, win damages in the State Court of Claims. *See Keystone Associates v. State*, 107 Misc.2d 169, 433 N.Y.S.2d 695 (Ct. Cl. 1980).

[3] *See* note 2, above.

tortion" in no way absolves the State. *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987) (citations omitted).[4]

The State offers a rote recitation of the host of cases which uphold rent control's general validity, while refusing to deal with the specifics of the Dawsons' dilemma. State Opp. 7-9. This obstinacy reaches its peak in the State's attempt to rely on *Bowles v. Willingham*, 321 U.S. 503 (1944). *Id.* at 8 n.5. As discussed in detail in the petition for certiorari, in *Bowles* this Court *recognized* the right of a rent-controlled landlord to cease renting; *Bowles* and its companion cases are thus directly at odds with the Appellate Division decision in *Dawson*. Pet. 3, 14-16. But in the respondents' view, this merits no response at all; instead, they simply invoke the talisman of rent control's general validity.

The right to exclude, in the words of this Court, "cannot be so easily manipulated." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982). Nor can it be so easily buried.

As to the conflict between the Appellate Division decision and those of the Washington and Massachusetts high courts, the State does deign to acknowledge, in a footnote, that the latter cases overturned "restrictions on an owner's ability to take his property off the rental market and occupy it for his own enjoyment." State Opp. 14 n.7, *citing Polednak v. Rent Control Board of Cambridge*, 397

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[4] The Appellate Division held that one way in which the Dawsons could supposedly terminate their tenancies was through a showing of financial hardship. *Dawson v. Higgins*, 610 N.Y.S.2d 200, 206 (1st Dept. 1994), Pet. App. 9a-10a; *see* Pet. 12-13 & n.7. In their briefs to this Court, both respondents now state that the Dawsons "cannot demonstrate economic hardship." State Opp. 12 n.6; *see also* City Opp. 6. The respondents characterize this as a concession on petitioners' part (*id.*; City Opp. 5), but in fact this point only further demonstrates that the Dawsons had no way out of their predicament.

Mass. 854, 494 N.E.2d 1025 (1986); *Kennedy v. City of Seattle*, 94 Wash.2d 376, 617 P.2d 713 (1980); *Granat v. Keasler*, 99 Wash.2d 564, 663 P.2d 830 (1983); *see* Pet. 16-17. But its response is one of self-serving circularity:

> "Nevertheless, in none of these cases did the court even suggest that under *reasonable* circumstances, such as where the tenants are elderly or otherwise long-standing occupants, the government could not prevent the eviction of tenants by an owner seeking to occupy the premises. Rather, in each of the cases cited by petitioners, the law was struck down because of a unique factor which placed *unreasonable* limits on the owner." State Opp. 14 n.7 (emphasis added).

The State points to nothing in these cases that even suggests a different outcome if the tenants at issue had been "elderly or otherwise long-standing". Instead, all it offers is the bare assertion that New York's law is "reasonable" while those involved in the other cases were "unreasonable".

Conflicting cases cannot be distinguished by *ipse dixit*. Joan Dawson's reliance on existing New York owner-occupancy law in buying her house was identical to the "reasonable belief" and "primary expectation" of the property owner in *Polednak*. 397 Mass. at 861, 494 N.E.2d at 1030. The nonterminable occupancy rights that the State subsequently bestowed on her tenants were even more restrictive than the houseboat owners' rights that were overturned in *Kennedy* and *Granat*. In the latter cases, the moorage owners at least had the theoretical, though impractical, option of relocating the houseboat owners. Joan Dawson did not have even that.

The respondents' agility in skirting these decisions, in avoiding *Yee*, and in totally ignoring this Court's ruling in *Bowles*, has implications that go beyond the instant case. This Court has issued a series of rulings on takings by physical occupation. These rulings are being ignored,

successfully, by rent control agencies. Their application to rent control needs to be made explicit.

In the words of one legal scholar, rent control can have "extraordinary impacts on ordinary people".[5] Not all of these impacts may be compensable, but what the Dawsons have suffered is. Even if their plight in itself does not warrant this Court's attention, the need for some bright-line ruling in this area does.

CONCLUSION

For these reasons, and for the other reasons previously set forth, a writ of certiorari should issue to review the order of the New York State Court of Appeals.

Respectfully submitted,

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December 16, 1994

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[5] Lochhead, *Live-in Nightmare on Dream Street*, INSIGHT, Feb. 26, 1990, at 22, 23 (quoting R. Epstein).

APPENDIX

APPENDIX

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. ———

JOAN DAWSON, PAUL DAWSON and TANDRA DAWSON,
Plaintiffs,

-against-

RICHARD L. HIGGINS, Commissioner of the Housing and Community Renewal, and FELICE MICHETTI, Commissioner of the Department of Housing Preservation and Development of the City of New York,
Defendants.

VERIFIED COMPLAINT

PLAINTIFFS, Joan Dawson, Paul Dawson and Tandra Dawson, by their attorneys, Ronald D. Hariri, ABADY, JAFFE & HARIRI, as and for their complaint herein, allege as follows:

* * * *

RELIEF REQUESTED

WHEREFORE, plaintiffs request that this Court determine, construe and declare the legal rights and regulations of the parties hereto with respect to the legality, validity and constitutionality of Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations, and issue judgment declaring that:

a. On the first cause of action, that Section 26-408(b)(1) of the Rent Control Law and Section

2204.5(a) of the Rent Control Regulations constitute and/or result in a physical taking of plaintiffs' private property by the government without just compensation, in violation of the Takings Clause of the Fifth Amendment to the United State Constitution.

b. On first cause of action, that Section 26-408 (b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations constitute and/or result in physical taking plaintiffs' private property by the government without just compensation, in violation of the Takings Clause of Article I, Section 7 of the New York State Constitution.

c. On the second cause of action, that Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations constitute and/or result in regulatory taking of plaintiffs' property by the government without just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.

d. On the second cause of action, that Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations constitute and/or result in a regulatory taking of plaintiffs' private property by the government without just compensation in violation of the Takings Clause of Article I, Section 7 of the New York State Constitution.

e. On the third cause of action, that Section 26-408 of the Rent Control Law and Section 2204.9 of the Rent Control Regulations constitute and/or result in a form of involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution.

f. On the fourth cause of action, that Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations constitute and/or result in a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

g. On the fourth cause of action, that Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations constitute and/or result in a violation of the Due Process Clause of Article I, Section 6 of the New York State Constitution.

h. On the first, second, third and fourth causes of action, that Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations are, by virtue of their unconstitutionality, null and void and of no effect.

i. For such other and further relief as this court may deem just and proper.

Yours, etc.,

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Dated: New York, New York
August 29, 1990